UNITED STATES REPORTS

VOLUME 533

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 2000

JUNE 11 THROUGH SEPTEMBER 25, 2001

TOGETHER WITH OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

END OF TERM

FRANK D. WAGNER

REPORTER OF DECISIONS

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ERRATA

524 U. S. 115, n. 5: delete lines 11 and 12 and the words "taxation if it remains freely alienable'," in line 13, and substitute: "this issue is outside the question presented in the petition for certiorari, see Pet. for Cert. i (question is whether land is 'subject to state and local taxation if it remains freely alienable'),".

532 U. S. 53, lines 23–24: "343 S. C. 342," should be "343 S. C. 350,".

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS*

WILLIAM H. REHNQUIST, Chief Justice.
JOHN PAUL STEVENS, Associate Justice.
SANDRA DAY O'CONNOR, Associate Justice.
ANTONIN SCALIA, Associate Justice.
ANTHONY M. KENNEDY, Associate Justice.
DAVID H. SOUTER, Associate Justice.
CLARENCE THOMAS, Associate Justice.
RUTH BADER GINSBURG, Associate Justice.
STEPHEN BREYER, Associate Justice.

RETIRED

BYRON R. WHITE, Associate Justice.

OFFICERS OF THE COURT

JOHN D. ASHCROFT, Attorney General.[1]
BARBARA D. UNDERWOOD, Acting Solicitor General.[2]
THEODORE B. OLSON, Solicitor General.[3]
WILLIAM K. SUTER, Clerk.
FRANK D. WAGNER, Reporter of Decisions.
DALE E. BOSLEY, Marshal.[4]
PAMELA TALKIN, Marshal.[5]
SHELLEY L. DOWLING, Librarian.

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*For notes, see p. IV.

NOTES

[1] Attorney General John D. Ashcroft, was presented to the Court on June 18, 2001. See *post*, p. IX.

[2] Acting Solicitor General Underwood resigned effective June 11, 2001.

[3] The Honorable Theodore B. Olson, of the Commonwealth of Virginia, was nominated by President Bush on February 14, 2001, to be Solicitor General; the nomination was confirmed by the Senate on May 24, 2001; he was commissioned on May 31, 2001, and took the oath of office on June 11, 2001. He was presented to the Court on June 11, 2001. See *post*, p. VII.

[4] Mr. Bosley retired as Marshal effective July 16, 2001.

[5] Ms. Talkin was appointed Marshal effective July 16, 2001.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective September 30, 1994, viz.:

For the District of Columbia Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the First Circuit, DAVID H. SOUTER, Associate Justice.

For the Second Circuit, RUTH BADER GINSBURG, Associate Justice.

For the Third Circuit, DAVID H. SOUTER, Associate Justice.

For the Fourth Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the Fifth Circuit, ANTONIN SCALIA, Associate Justice.

For the Sixth Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, CLARENCE THOMAS, Associate Justice.

For the Ninth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Tenth Circuit, STEPHEN BREYER, Associate Justice.

For the Eleventh Circuit, ANTHONY M. KENNEDY, Associate Justice.

For the Federal Circuit, WILLIAM H. REHNQUIST, Chief Justice.

September 30, 1994.

(For next previous allotment, and modifications, see 502 U. S., p. VI, 509 U. S., p. V, and 512 U. S., p. V.)

PRESENTATION OF THE SOLICITOR GENERAL

SUPREME COURT OF THE UNITED STATES

MONDAY, JUNE 11, 2001

Present: CHIEF JUSTICE REHNQUIST, JUSTICE STEVENS, JUSTICE O'CONNOR, JUSTICE SCALIA, JUSTICE KENNEDY, JUSTICE SOUTER, JUSTICE THOMAS, JUSTICE GINSBURG, and JUSTICE BREYER.

THE CHIEF JUSTICE said:

The Court at this time wishes to note for the record that Barbara D. Underwood has been serving as Acting Solicitor General since January last. The Court recognizes the considerable responsibility that has been placed on you, Ms. Underwood, to represent the government of the United States before this Court. On behalf of my colleagues, I thank you for a job well done and you have our sincere appreciation.

The Court now recognizes you.

The Acting Solicitor General said:

MR. CHIEF JUSTICE, and may it please the Court. I have the honor to present to the Court the Solicitor General of the United States, the Honorable Theodore B. Olson, of Virginia.

THE CHIEF JUSTICE said:

Mr. Solicitor General, the Court welcomes you to the performance of the important office that you have assumed, to represent the government of the United States before this Court. You follow in the footsteps of other outstanding at-

torneys who have held your new office. Your commission will be duly recorded by the Clerk.

Solicitor General Olson said:

Thank you, MR. CHIEF JUSTICE.

PRESENTATION OF THE ATTORNEY GENERAL

SUPREME COURT OF THE UNITED STATES

MONDAY, JUNE 18, 2001

Present: CHIEF JUSTICE REHNQUIST, JUSTICE STEVENS, JUSTICE O'CONNOR, JUSTICE SCALIA, JUSTICE KENNEDY, JUSTICE SOUTER, JUSTICE THOMAS, JUSTICE GINSBURG, and JUSTICE BREYER.

THE CHIEF JUSTICE said:

The Court now recognizes the Solicitor General of the United States.

Solicitor General Olson said:

MR. CHIEF JUSTICE, and may it please the Court. I have the honor to present to the Court the seventy-ninth Attorney General of the United States, the Honorable John D. Ashcroft of Missouri.

THE CHIEF JUSTICE said:

General Ashcroft, on behalf of the Court, I welcome you as the chief law officer of the United States government and as an officer of this Court. We welcome you to the performance of the very important duties that will rest upon you by virtue of your office. Your commission as Attorney General of the United States will be placed in the records of the Court, and we wish you well in your new office.

Attorney General Ashcroft said:

Thank you, MR. CHIEF JUSTICE.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2000

KANSAS *v.* COLORADO

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

No. 105, Orig. Argued March 19, 2001—Decided June 11, 2001

The Arkansas River rises in Colorado and flows through Kansas and several other States before emptying into the Mississippi River. In 1949, Congress approved the Arkansas River Compact (Compact), which Colorado and Kansas negotiated, and which provided in Article IV–D that, *inter alia*, future development of the river basin could not materially deplete the usable quantity or availability to other users of the river's waters. In 1986, Kansas filed a complaint alleging that Colorado had violated the Compact. In his first report, the Special Master found that post-Compact increases in groundwater well pumping in Colorado had materially depleted the waters in violation of Article IV–D; in his second report, he recommended that damages be awarded to Kansas; and in his third report, he recommended that such damages be measured by Kansas' losses attributable to Compact violations since 1950, be paid in money not water, and include prejudgment interest from 1969 to the date of judgment. Colorado has filed four objections to the third report, Kansas has filed one, and the United States submits that all objections should be overruled.

Held:

1. The recommended damages award does not violate the Eleventh Amendment. Thus, Colorado's first exception is overruled. Colorado contends that the Amendment precludes damages based on losses sustained by individual Kansas farmers, as the Report recommends. Kansas has unquestionably made the required showing that it has a direct interest of its own and is not merely seeking recovery for the benefit of

Syllabus

individuals who are the real parties in interest. *Oklahoma ex rel. Johnson* v. *Cook*, 304 U. S. 387, 396. This is but one of several proceedings in which Kansas' own interest in preventing upstream diversion of the river has justified the exercise of this Court's original jurisdiction. Kansas has been in full control of this litigation since its inception, and its right to control the disposition of any recovery of damages is unencumbered. The injury to individual farmers is but one component of the formula adopted by the Special Master to quantify damages here. When a State properly invokes this Court's original jurisdiction, neither the measure of, nor the method for calculating, damages can retrospectively negate that jurisdiction. Nor would jurisdiction be affected by Kansas' postjudgment decision about whether to deposit the money recovered in its general coffers or use the money to benefit those who were hurt by the violation. Pp. 7–9.

2. The unliquidated nature of Kansas' money damages does not bar an award of prejudgment interest. Thus, Colorado's second exception is overruled. This Court has long recognized that the common-law distinction between liquidated and unliquidated damages is unsound, *Funkhouser* v. *J. B. Preston Co.*, 290 U. S. 163, 168, and that a monetary award does not fully compensate for an injury unless it includes an interest component, see, *e. g.*, *Milwaukee* v. *Cement Div., National Gypsum Co.*, 515 U. S. 189, 195. The Special Master acted properly in declining to follow this long-repudiated common-law rule. Pp. 9–12.

3. The Special Master determined the appropriate rate for the prejudgment interest award and determined that interest should begin running in 1969. Colorado's third exception is overruled insofar as it challenges the interest rates and sustained insofar as it challenges the Special Master's recommendation that the interest should begin to accrue in 1969. Kansas' exception that the interest should begin to accrue in 1950 is overruled. Pp. 12–16.

(a) Because this Court has decided that Kansas could measure a portion of its damages by individual farmers' losses, the interest rates applicable to individuals in the relevant years, rather than the lower rates available to States, may properly be used to calculate damages. Pp. 12–13.

(b) The Special Master concluded that interest should be awarded according to fairness considerations rather than a rigid theory of compensation for money withheld. Kansas' argument that this Court has effectively foreclosed that equities-balancing approach has some merit, but this Court cannot say that by 1949 the Court's case law had developed sufficiently to put Colorado on notice that prejudgment interest would automatically be awarded from the time of injury for a Compact violation. Therefore, the Special Master acted properly in analyzing

this case's facts and awarding only as much prejudgment interest as was required by balancing the equities. The equities support an award beginning on a date later than the date of first violation. The factors the Special Master considered—that no one thought that the pact was being violated in the early years after it was signed and that a long interval passed between the original injuries and these proceedings, as well as the dramatic impact of compounding interest over many years—fully justify his view that prejudgment interest should not be awarded for any years before either party was aware of the excessive pumping. Colorado suggests that prejudgment interest should begin to accrue in 1985, the year the complaint was filed, rather than 1969, when Colorado knew or should have known that it was violating the Compact. Though the issue is close, the equities favor the later date. In overruling Colorado's exceptions to the second report, this Court held that Kansas was not guilty of inexcusable delay in failing to complain more promptly about the post-Compact pumping because the nature and extent of the violations were unclear even years after the violation became obvious. That conclusion is a double-edged sword. Both States' interests would have been served had the claim been advanced promptly after its basis became known, and it was clear that once the proceedings started they would be complex and protracted. Given the uncertainty over the damages' scope that prevailed from 1968 and 1985 and the fact Kansas had the power to begin the process by which those damages would be quantified, Colorado's request that the Court deny prejudgment interest for that time is reasonable. Pp. 13–16.

4. The Special Master properly determined the value of the crop losses attributable to Compact violations. Thus, Colorado's fourth exception is overruled. Kansas and Colorado disagreed as to how much additional crop yield would have been produced with the missing water. Kansas' experts relied upon the hypothesis of a generally linear relationship between water available for use and increased crop yields. Colorado, whose own expert recanted an alternative proposal for calculating damages, attempts to poke holes in Kansas' methodology through a speculative application of economic theory. That attack is unpersuasive, given Colorado's inability to mount an effective challenge to Kansas' experts on their own terms and its complete failure to provide a plausible alternative estimate of crop damage. Pp. 16–20.

Colorado's exceptions sustained in part and overruled in part; Kansas' exception overruled; and case remanded.

STEVENS, J., delivered the opinion of the Court, Parts I, IV, and V of which were unanimous, and Parts II and III of which were joined by REHNQUIST, C. J., and KENNEDY, SOUTER, GINSBURG, and BREYER,

JJ. O'CONNOR, J., filed an opinion concurring in part and dissenting in part, in which SCALIA and THOMAS, JJ., joined, *post*, p. 20.

John B. Draper, Special Assistant Attorney General of Kansas, argued the cause for plaintiff. With him on the briefs were *Carla J. Stovall*, Attorney General, *John W. Campbell*, Chief Deputy Attorney General, *John M. Cassidy*, Assistant Attorney General, *Leland E. Rolfs*, Special Assistant Attorney General, and *Andrew S. Montgomery*.

Jeffrey P. Minear argued the cause for intervenor United States. With him on the briefs were *Solicitor General Waxman*, *Assistant Attorney General Schiffer*, *Deputy Solicitor General Kneedler*, and *Patricia Weiss*.

David W. Robbins, Special Assistant Attorney General of Colorado, argued the cause for defendant. With him on the briefs were *Ken Salazar*, Attorney General, *Carol D. Angel*, Senior Assistant Attorney General, and *Dennis M. Montgomery*, Special Assistant Attorney General.

JUSTICE STEVENS delivered the opinion of the Court.

The Arkansas River rises in the mountains of Colorado just east of the Continental Divide, descends for about 280 miles to the Kansas border, then flows through that State, Oklahoma, and Arkansas and empties into the Mississippi River. On May 20, 1901, Kansas first invoked this Court's original jurisdiction to seek a remedy for Colorado's diversion of water from the Arkansas River. See *Kansas* v. *Colorado*, 185 U. S. 125, 126 (1902) (statement of case). In opinions written during the past century, most recently in *Kansas* v. *Colorado*, 514 U. S. 673, 675–678 (1995), we have described the history and the importance of the river. For present purposes it suffices to note that two of those cases, *Kansas* v. *Colorado*, 206 U. S. 46 (1907), and *Colorado* v. *Kansas*, 320 U. S. 383 (1943), led to the negotiation of the Arkansas River Compact (Compact), an agreement between Kansas and Colorado that in turn was approved by Congress in 1949. See 63 Stat. 145. The case before us today in-

volves a claim by Kansas for damages based on Colorado's violations of that Compact.

The Compact was designed to "[s]ettle existing disputes and remove causes of future controversy" between the two States and their citizens concerning waters of the Arkansas River and to "[e]quitably divide and apportion" those waters and the benefits arising from construction and operation of the federal project known as the "John Martin Reservoir." Arkansas River Compact, Art. I, reprinted in App. to Brief for Kansas A–1, A–2. Article IV–D of the Compact provides:

> "This Compact is not intended to impede or prevent future beneficial development of the Arkansas River basin in Colorado and Kansas by Federal or State agencies, by private enterprise, or by combinations thereof, which may involve construction of dams, reservoir, and other works for the purpose of water utilization and control, as well as the improved or prolonged functioning of existing works: Provided, that the waters of the Arkansas River, as defined in Article III, shall not be materially depleted in usable quantity or availability for use to the water users in Colorado and Kansas under this Compact by such future development or construction." *Id.*, at A–5.

It is the proviso to that paragraph that is of special relevance to this case.

In 1986, we granted Kansas leave to file a complaint alleging three violations of the Compact by Colorado. See 514 U. S., at 679–680. After taking evidence in the liability phase of the proceeding, Special Master Arthur L. Littleworth filed his first report, in which he recommended that two of the claims be denied, but that the Court find that post-Compact increases in groundwater well pumping in Colorado had materially depleted the waters of the river in violation of Article IV–D. See *id.*, at 680. We overruled

Colorado's exceptions to that recommendation, including an argument that Kansas was guilty of laches. *Id.*, at 687–689. We remanded the case to the Special Master to determine an appropriate remedy for the violations of Article IV–D. *Id.*, at 694.

After further proceedings the Special Master filed a second report recommending an award of damages. Colorado filed exceptions to that report, arguing that the Eleventh Amendment barred an award based on losses incurred by Kansas citizens, and that the report improperly recommended the recovery of prejudgment interest on an unliquidated claim. We overruled those exceptions without prejudice to their renewal after the Special Master made a more specific recommendation for a remedy. 522 U. S. 1073 (1998). He did so in his third report, and we are now confronted with exceptions filed by both States.

In the third report, the Special Master recommends that damages be measured by Kansas' losses, rather than Colorado's profits, attributable to Compact violations after 1950; that the damages be paid in money rather than water; and that the damages should include prejudgment interest from 1969 to the date of judgment. Colorado has filed four objections to the report. It contends (1) that the recommended award of damages would violate the Eleventh Amendment to the United States Constitution; (2) that the damages award should not include prejudgment interest; (3) that the amount of interest awarded is excessive; and (4) that the Special Master improperly credited flawed expert testimony, with the result that Kansas' crop production losses were improperly calculated. On the other hand, Kansas has filed an objection submitting that prejudgment interest should be paid from 1950, rather than 1969. The United States, which intervened because of its interest in the operation of flood control projects in Colorado, submits that both States' objections should be overruled.

I

We have decided that a State may recover monetary damages from another State in an original action, without running afoul of the Eleventh Amendment.[1] See, *e. g.*, *Texas* v. *New Mexico*, 482 U. S. 124, 130 (1987) ("The Court has recognized the propriety of money judgments against a State in an original action, and specifically in a case involving a compact. In proper original actions, the Eleventh Amendment is no barrier, for by its terms, it applies only to suits by citizens against a State" (citations omitted)); see also *Maryland* v. *Louisiana*, 451 U. S. 725, 745, n. 21 (1981); *South Dakota* v. *North Carolina*, 192 U. S. 286, 317–321 (1904). Colorado contends, however, that the Eleventh Amendment precludes any such recovery based on losses sustained by individual water users in Kansas.

It is firmly established, and undisputed in this litigation, that the text of the Eleventh Amendment would bar a direct action against Colorado by citizens of Kansas. Moreover, we have several times held that a State may not invoke our original jurisdiction when it is merely acting as an agent or trustee for one or more of its citizens. For example, in *New Hampshire* v. *Louisiana*, 108 U. S. 76 (1883), we refused to assume jurisdiction over an action to recover payment on defaulted bonds that had been formally assigned to the state plaintiffs but remained beneficially owned by private individuals. And, in *North Dakota* v. *Minnesota*, 263 U. S. 365 (1923), we held that, while the plaintiff State could obtain an injunction against the improper operation of Minnesota's drainage ditches, the Eleventh Amendment precluded an award of damages based on injuries to individual farmers, where the damages claim was financed by

[1] That Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

contributions from the farmers and the State had committed to dividing any recovery among the farmers "in proportion to the amount of [their] loss." *Id.*, at 375.

Those cases make it clear that a "State is not permitted to enter a controversy as a nominal party in order to forward the claims of individual citizens." *Maryland* v. *Louisiana*, 451 U. S., at 737; see also *New Hampshire* v. *Louisiana*, 108 U. S., at 89 (Eleventh Amendment applies and acts to bar jurisdiction where "the State and the attorney-general are only nominal actors in the proceeding"). The "governing principle" is that in order to invoke our original jurisdiction, "the State must show a direct interest of its own and not merely seek recovery for the benefit of individuals who are the real parties in interest." *Oklahoma ex rel. Johnson* v. *Cook*, 304 U. S. 387, 396 (1938).

Kansas has unquestionably made such a showing. Indeed, the present proceeding is but one of several in which Kansas' own interest in preventing upstream diversions from the Arkansas River has justified an exercise of our original jurisdiction. In *Cook* we even offered as an example of proper original jurisdiction one of the prior original suits between Kansas and Colorado, see *id.*, at 393–394 (citing *Kansas* v. *Colorado*, 206 U. S. 46 (1907)), and in *Texas* v. *New Mexico* we held that enforcement of an interstate water compact by means of a recovery of money damages can be within a State's proper pursuit of the "general public interest" in an original action, 482 U. S., at 132, n. 7.

Moreover, the record in this case plainly discloses that the State of Kansas has been in full control of this litigation since its inception. Its right to control the disposition of any recovery of damages is entirely unencumbered. The injury to individual farmers is but one component of the formula adopted by the Special Master to quantify the damages caused by Colorado's violation of its contractual obligations. In short, there is simply nothing in the record to suggest that the State of Kansas is merely a "nominal party" to this

litigation or that the individual farmers are "the real parties in interest."

When a State properly invokes our jurisdiction to seek redress for a wrong perpetrated against it by a sister State, neither the measure of damages that we ultimately determine to be proper nor our method for calculating those damages can retrospectively negate our jurisdiction. Nor would our jurisdiction to order a damages remedy be affected by Kansas' postjudgment decisions concerning the use of the money recovered from Colorado. As we have previously recognized, it is the State's prerogative either to deposit the proceeds of any judgment in "the general coffers of the State" or to use them to "benefit those who were hurt." *Ibid.*

We overrule Colorado's first exception.

II

Colorado next excepts to the Special Master's conclusion that the damages award should include prejudgment interest despite the fact that Kansas' claim is unliquidated.[2] At one point in time, the fact that the claim was unliquidated would have been of substantial importance. As a general matter, early common-law cases drew a distinction between liquidated and unliquidated claims and refused to allow interest on the latter. See, *e. g.*, Comment, Prejudgment Interest:

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[2] Though final damages have not yet been calculated, the importance of this issue is illustrated by breaking down the damages claimed by Kansas. Of $62,369,173 in damages so claimed, $9,218,305 represents direct and indirect losses in actual dollars when the damage occurred. Of the remaining $53,150,868, about $12 million constitutes an adjustment for inflation (a type of interest that Colorado concedes is appropriate) while the remaining amount (approximately $41 million) represents additional interest intended to compensate for lost investment opportunities. Third Report of Special Master 87–88 (hereinafter Third Report). The magnitude of prejudgment interest ultimately awarded in this case will, of course, turn on the date from which interest accrues. See Part III–B, *infra*.

Survey and Suggestion, 77 Nw. U. L. Rev. 192, 196, and n. 26 (1982) (discussing history and collecting sources). This rule seems to have rested upon a belief that there was something inherently unfair about requiring debtors to pay interest when they were unable to halt its accrual by handing over to their creditors a fixed and unassailable amount. See, *e. g.*, *id.*, at 196.

This common-law distinction has long since lost its hold on the legal imagination. Beginning in the early part of the last century, numerous courts and commentators have rejected the distinction for failing to acknowledge the compensatory nature of interest awards.[3] This Court allied itself with the evolving consensus in 1933, when we expressed the opinion that the distinction between cases of liquidated and unliquidated damages "is not a sound one." *Funkhouser* v. *J. B. Preston Co.*, 290 U. S. 163, 168 (1933). The analysis supporting that conclusion gave no doubt as to our reasoning: "Whether the case is of the one class or the other, the injured party has suffered a loss which may be regarded as not fully compensated if he is confined to the amount found to be recoverable as of the time of breach and nothing is added for the delay in obtaining the award of damages." *Ibid.* Our cases since 1933 have consistently acknowledged that a monetary award does not fully compensate for an injury unless it includes an interest component. See, *e. g.*, *Milwaukee* v. *Cement Div., National Gypsum Co.*, 515 U. S. 189, 195 (1995) ("The essential rationale for awarding pre-

[3] For sources from the early part of the century criticizing, qualifying, or rejecting the distinction, see, *e. g.*, *Faber* v. *New York*, 222 N. Y. 255, 262, 118 N. E. 609, 610–611 (1918); *Bernhard* v. *Rochester German Ins. Co.*, 79 Conn. 388, 398, 65 A. 134, 138 (1906); Restatement of Contracts § 337, p. 542 (1932); C. McCormick, Law of Damages § 51, p. 210 (1935); 1 T. Sedgwick, Measure of Damages § 315 (9th ed. 1912); cf. 3 S. Williston, Law of Contracts § 1413, p. 2508 (1920) ("The disinclination to allow interest on claim of uncertain amount seems based on practice rather than theoretical grounds"). For a thorough modern treatment of the issue, see 1 D. Dobbs, Law of Remedies § 3.6(3) (2d ed. 1993).

judgment interest is to ensure that an injured party is fully compensated for its loss"); *West Virginia* v. *United States*, 479 U. S. 305, 310–311, n. 2 (1987); *General Motors Corp.* v. *Devex Corp.*, 461 U. S. 648, 655–656, n. 10 (1983).

Relying on our cases, the Special Master "concluded that the unliquidated nature of Kansas' money damages does not, in and of itself, bar an award of prejudgment interest." Second Report, § XV, reprinted in App. to Third Report 43. In reaching that conclusion, the Special Master was fully cognizant of both the displaced common-law rule and the subsequent doctrinal evolution. In addition, he gave careful consideration to equitable considerations that might mitigate against an award of interest, concluding that "considerations of fairness," *Board of Comm'rs of Jackson Cty.* v. *United States*, 308 U. S. 343, 352 (1939), supported the award of at least some prejudgment interest in this case.

We find no fault in the Special Master's analysis of either our prior cases or the equities of this matter. While we will deal with the amount of prejudgment interest below, to answer Colorado's second objection it is sufficient to conclude that the Special Master was correct in determining that the unliquidated nature of the damages does not preclude an award of prejudgment interest.[4]

[4] JUSTICE O'CONNOR argues that the state of the law was insufficiently evolved by 1949 for Colorado to have had notice that the courts might award prejudgment interest if it violated its obligations under the Compact. See *post*, at 21–25 (opinion concurring in part and dissenting in part). Though the law was indeed in flux at that time, this Court had already made it clear that it put no stock in the traditional common-law prohibition, see *Funkhouser* v. *J. B. Preston Co.*, 290 U. S. 163, 168 (1933), and had stated explicitly that such interest may accrue when "considerations of fairness" demand it, see *Board of Comm'rs of Jackson Cty.* v. *United States*, 308 U. S. 343, 352 (1939). The contemporary Restatement of Contracts was in accord. See Restatement of Contracts § 337(b), at 542 ("Where the contract that is broken [is not for a set or easily ascertainable amount of money], interest may be allowed in the discretion of the court, if justice requires it, on the amount that would have been just compensation if it had been paid when performance was

Colorado's second exception is overruled.

III

Colorado's third exception takes issue with both the rate of interest adopted by the Special Master and the date from which he recommended that interest begin to accrue. As to the second of these two concerns, Colorado submits that, if any prejudgment interest is to be awarded, it should begin to accrue in 1985 (when Kansas filed its complaint in this action), rather than in 1969 (when, the Special Master concluded, Colorado knew or should have known that it was violating the Compact). On the other hand, Kansas has entered an exception, arguing that the accrual of interest should begin in 1950. We first address the rate question, then the timing issue.

A

The Special Master credited the testimony of Kansas' three experts who calculated the interest rates that they thought necessary to provide full compensation for the damages caused by Colorado's violations of the Compact in the years since 1950. As a result of inflation and changing market conditions those rates varied from year to year. In their calculation of the damages suffered by Kansas farmers, the experts used the interest rates that were applicable to individuals in the relevant years rather than the (lower) rates available to States.

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due"). Under those circumstances, we think it is clear that, in 1949, an informed contracting party would not have concluded that an agreement's silence on the issue deprived a reviewing court of the authority to award compensatory interest if the party willfully violated its contractual obligations. Moreover, under JUSTICE O'CONNOR's reasoning, States who entered into interstate compacts before 1987, see *post*, at 23, would retain a perpetual incentive to breach their contractual obligations and reap the benefits of such a breach with the full knowledge that the courts lack the authority to order a fully compensatory remedy.

Colorado argues that the lower rates should have been used because it is the State, rather than the individual farmers, that is maintaining the action and will receive any award of damages. But if, as we have already decided, see Part I, *supra*, it is permissible for the State to measure a portion of its damages by losses suffered by individual farmers, it necessarily follows that the courts are free to utilize whatever interest rate will most accurately measure those losses. The money in question in this portion of the damages award is revenue that would—but for Colorado's actions—have been earned by individual farmers. Thus, the Special Master correctly concluded that the economic consequences of Colorado's breach could best be remedied by an interest award that mirrors the cost of any additional borrowing the farmers may have been forced to undertake in order to compensate for lost revenue.

B

Although the Special Master rejected Colorado's submission that there is a categorical bar to the award of prejudgment interest on unliquidated claims, he concluded that such interest should not "be awarded according to [any] rigid theory of compensation for money withheld," but rather should respond to "'considerations of fairness.'" Third Report 97 (quoting *Jackson Cty.*, 308 U. S., at 352). Kansas argues that our decisions subsequent to *Jackson County* have effectively foreclosed the equities-balancing approach that the Special Master adopted. There is some merit to Kansas' position. See *National Gypsum Co.*, 515 U. S., at 193 (affirming a decision of the Court of Appeals that had read our cases as "disapproving of a 'balancing of the equities' as a method of deciding whether to allow prejudgment interest").

However, despite the clear direction indicated by some of our earlier opinions, we cannot say that by 1949 our case law had developed sufficiently to put Colorado on notice

that, upon a violation of the Compact, we would automatically award prejudgment interest from the time of injury. Given the state of the law at that time, Colorado may well have believed that we would balance the equities in order to achieve a just and equitable remedy, rather than automatically imposing prejudgment interest in order to achieve full compensation. See *Jackson Cty.*, 308 U. S., at 352 (prejudgment interest award limited by "considerations of fairness"); *Miller* v. *Robertson*, 266 U. S. 243, 258 (1924) ("[W]hen necessary in order to arrive at fair compensation, the court in the exercise of a sound discretion may include interest or its equivalent as an element of damages" on unliquidated claims); Restatement of Contracts § 337, p. 542 (1932) (prejudgment interest on unliquidated claims "may be allowed in the discretion of the court, if justice requires it"). While we are confident that, when it signed the Compact, Colorado was on notice that it might be subject to prejudgment interest if such interest was necessary to fashion an equitable remedy, we are unable to conclude with sufficient certainty that Colorado was on notice that such interest would be imposed as a matter of course. We, therefore, believe that the Special Master acted properly in carefully analyzing the facts of the case and in only awarding as much prejudgment interest as was required by a balancing of the equities.

We also agree with the Special Master that the equities in this case do not support an award of prejudgment interest from the date of the first violation of the Compact, but rather favor an award beginning on a later date. In reaching this conclusion, the Special Master appropriately considered several factors. In particular, he relied on the fact that in the early years after the Compact was signed, no one had any thought that the pact was being violated. Third Report 106. In addition, he considered the long interval that passed between the original injuries and these proceedings, as well as the dramatic impact of compounding interest over many years. *Id.*, at 99–101; see also n. 3, *supra*.

In its exception, Kansas argues that the Special Master's reasoning would be appropriate if damages were being awarded as a form of punishment, but does not justify a refusal to provide full compensation to an injured party. Moreover, Kansas argues, a rule that rewards ignorance might discourage diligence in making sure that there is full compliance with the terms of the Compact. Kansas' argument is consistent with a "rigid theory of compensation for money withheld," but, for the reasons discussed above, we are persuaded that the Special Master correctly declined to adopt such a theory. The equitable considerations identified by the Special Master fully justify his view that in this case it would be inappropriate to award prejudgment interest for any years before either party was aware of the excessive pumping in Colorado.

In its third exception, Colorado argues that, if prejudgment interest is to be awarded at all, the equities are best balanced by limiting such interest to the time after the complaint was filed, rather than the time after which Colorado knew or should have known that it was violating the Compact. Specifically, Colorado suggests that prejudgment interest should begin to accrue in 1985 rather than 1969. The choice between the two dates is surely debatable; it is a matter over which reasonable people can—and do—disagree. After examining the equities for ourselves, however, a majority of the Court has decided that the later date is the more appropriate.[5]

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[5] JUSTICE O'CONNOR, JUSTICE SCALIA, and JUSTICE THOMAS would not allow any prejudgment interest. See *post*, at 20. JUSTICE KENNEDY and THE CHIEF JUSTICE are of the opinion that prejudgment interest should run from the date of the filing of the complaint. JUSTICE SOUTER, JUSTICE GINSBURG, JUSTICE BREYER, and the author of this opinion agree with the Special Master's view that interest should run from the time when Colorado knew or should have known that it was violating the Compact. In order to produce a majority for a judgment, the four Justices who agree with the Special Master have voted to endorse the position expressed in the text.

When we overruled Colorado's objections to the Special Master's first report, we held that Kansas was not guilty of inexcusable delay in failing to complain more promptly about post-Compact well pumping. 514 U. S., at 687–689. In saying that the delay was not inexcusable, we recognized that the nature and extent of Colorado's violations continued to be unclear even in the years after which it became obvious that the Compact was being violated. *Id.*, at 688–689. That conclusion is something of a two-edged sword, however. While Kansas' delay was understandable given the amorphous nature of its claims, there is no doubt that the interests of both States would have been served if the claim had been advanced promptly after its basis became known. Once it became obvious that a violation of the Compact had occurred, it was equally clear that the proceedings necessary to evaluate the significance of the violations would be complex and protracted. Despite the diligence of the parties and the Special Master, over 15 years have elapsed since the complaint was filed. Given the uncertainty over the scope of damages that prevailed during the period between 1968 and 1985 and the fact that it was uniquely in Kansas' power to begin the process by which those damages would be quantified, Colorado's request that we deny prejudgment interest for that period is reasonable.

For these reasons, we overrule Kansas' exception. We also overrule Colorado's third exception insofar as it challenges the interest rates recommended by the Special Master, but we sustain that objection insofar as it challenges the award of interest for the years prior to 1985.

IV

Colorado's final objection challenges the Special Master's determination of the value of the crop losses attributable to the Compact violations, the largest component of Kansas' damages claim. The Special Master accomplished the calculation by estimating the amount of farmland affected by

Colorado's violations, the crops planted on that farmland, the price of those crops, and the difference in yield between what the affected land would have produced with the additional water and what the land actually produced with the water it received.

The parties were in agreement concerning most of the facts bearing on the Special Master's calculation. They agreed that water was in short supply in the affected area each year, 178 Tr. 127–128; they agreed on the amount of the shortage that resulted from Colorado's violations, *ibid.*; and they generally agreed on which crops were planted on the affected farmland as well as the prices of those crops in the relevant years. See Third Report 46.

The only issue on which the parties disagreed was the exact effect of the diverted water on the crop yields for the farmland in question. On that score, both Kansas and Colorado accepted the general notion that "[u]p to the point where crops no longer can make use of additional water, more water produces more crop yield." *Id.*, at 47. But they parted ways on the question of precisely how much additional yield would have been produced with the missing water.[6] Kansas' experts relied upon the hypothesis of a generally linear relationship between water available for

[6] As the Special Master noted, "Colorado experts did not dispute, in general, the linear relationship between [water usage] and crop yield. . . . However, they were of the view that the particular linear crop yield coefficients used by Kansas were not sufficiently reliable to determine the increase in yields that would have occurred if there had been no depletions of headgate deliveries to the [affected] lands." Third Report 47. Colorado suggests that Kansas' model, based as it is upon academic studies, does not adequately account for reductions in crop yield from such real-world conditions as "weather, disease, and pests." Brief for Colorado 44, n. 12. But, as the Special Master correctly noted, Kansas' experts reduced the predicted crop yield by 25% in order to account for such possibilities. Third Report 51 ("The 25% reduction was calculated to adjust the controlled experimental data to 'realistic long-term type conditions' in western Kansas, including high temperatures, winds, insects, and other stressful conditions").

use and increased crop yields. With figures drawn from a number of studies, Professor Norman Whittlesey, Kansas' principal expert,[7] developed quantitative estimates of the lost yield, per unit of water, for the various crops grown on the affected farmland. Although Colorado's expert initially attempted to propose his own model, he ultimately abandoned his position when confronted with flaws in his data. 197 Tr. 44–46.

Its own expert having recanted his alternative proposal for calculating the effects of the diverted water on crop yield, Colorado attempts to poke holes in Kansas' methodology through a speculative application of abstract economic theory. Kansas' numbers (for crop losses due to diverted water) cannot be correct, Colorado argues, because if they were, it would have been economically profitable for the affected farmers to drill wells and obtain water from underground sources rather than suffer the reduced yield from the shortage of surface water. Brief for Colorado 41–49. Because Kansas farmers did not install wells, Colorado concludes, we can know that the diverted water was not as valuable as Kansas' experts claim.

The Special Master did not question Colorado's assertion that digging wells would, in retrospect, actually have been profitable for Kansas farmers, but he declined to employ Colorado's argument as a basis for rejecting Kansas' expert testimony on the extent of crop losses. His thoughtful analysis is worth quoting in full:

> "Given the hindsight of present day economists, it might have been profitable for everyone to drill supplemental wells . . . . However, there are many reasons why this may not have been done, and the failure to drill wells does not by itself indicate that Kansas'

[7] Professor Whittlesey served for 20 years as a full professor and agricultural economist at Washington State University. His publications, many of which concern the kind of issues presented by this case, fill 14 pages on his curriculum vitae. See Kan. Exh. 891.

> estimate of crop losses is too high. The favorable economics of drilling wells may not have been understood at the time. Quality information regarding costs and returns was not readily available. [211 Tr.] 31. Some farmers, for reasons of age or otherwise, may not have wanted to go into long-term debt. Some farmers may not have had the available capital, or the credit to borrow. Many farmers were 'cash poor.' *Id.* at 32. Some farmers may have been averse to risk. Some farmers may have been tenants, and the landlord may not have been willing to undertake the necessary investment. Some farms may have been small in terms of total acreage, or the acreage spread out over space, so that it was not feasible or practical to consider a well investment. [208 Tr.] 37–39. Capital for well investments, with three to ten year repayment periods, was less available than for long-term investments. [211 Tr.] 32." Third Report 60–61.

We agree with the Special Master that accepting Colorado's argument requires a good deal of speculation, not only about the comparative advantages of wells as opposed to irrigation, but also about the ability of the farmers fully to understand or to implement different choices without the benefit of expert hindsight. Given Colorado's inability to mount an effective challenge to Kansas' experts on their own terms and its complete failure to provide a plausible alternative estimate of the crop damage that resulted from its violations of the Compact, we conclude that its attack on Kansas' conclusions is unpersuasive.[8]

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[8] We also agree with the Special Master's decision to disregard the Colorado expert's comparison of the numbers produced by Kansas' model with numbers drawn from the literature on the various crops planted on the affected farmland. As Colorado admits, see Brief for Colorado 46, the water values in the literature were not based on "a 'short-short run' situation, that is, an intra-seasonal transaction in which no capital costs were involved, and only additional harvesting and irrigation costs would

Colorado's fourth exception is overruled.

V

We remand the case to the Special Master for preparation of a final judgment consistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, with whom JUSTICE SCALIA and JUSTICE THOMAS join, concurring in part and dissenting in part.

I agree with the Court's disposition of this case as to Colorado's first and fourth exceptions to the Special Master's Third Report, concerning the award and determination of damages. I therefore join Parts I, IV, and V of the Court's opinion. I do not concur in Parts II and III of the Court's opinion because I believe that the award of prejudgment interest to Kansas, coming over half a century after the Arkansas River Compact's (hereinafter Compact) negotiation and approval, is clearly improper under our precedents.

We are dealing with an interstate compact apportioning the flow of a river between two States. A compact is a contract. It represents a bargained-for exchange between its signatories and "remains a legal document that must be construed and applied in accordance with its terms." *Texas* v. *New Mexico*, 482 U. S. 124, 128 (1987); see also *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U. S. 275, 285 (1959) (Frankfurter, J., dissenting) ("A Compact is, after all, a contract"). It is a fundamental tenet of contract law that parties to a contract are deemed to have contracted with reference to principles of law existing at the time the contract was made. See, *e. g.*, *Norfolk & Western R. Co.* v.

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be required." Third Report 63. Because the circumstances in Kansas involved short-short run situations, and because such short-short run situations generally involve higher values for water, values derived from other contexts are of limited use in evaluating Kansas' model. See *ibid.*

Train Dispatchers, 499 U. S. 117, 129–130 (1991); *Farmers and Merchants Bank of Monroe* v. *Federal Reserve Bank of Richmond*, 262 U. S. 649, 660 (1923); see generally 11 Williston on Contracts § 30:19 (4th ed. 1999). The basic question before the Court is thus one of "the fair intendment of the contract itself." *Virginia* v. *West Virginia*, 238 U. S. 202, 233 (1915). Specifically, the question is whether, at the time the Compact was negotiated and approved, Colorado and Kansas could fairly be said to have intended, or at least to have expected or assumed, that Colorado might be exposing itself to liability for prejudgment interest in the event of the Compact's breach. Cf. *id.*, at 232–236 (awarding interest to Virginia in a suit against West Virginia for breach of a contract to assume "an equitable proportion" of Virginia's interest-bearing public debt upon finding that "there is no escape from the conclusion that there was a contract duty on the part of West Virginia to provide for accruing interest as a part of the equitable proportion assumed").

I fail to see how Colorado and Kansas could have contemplated that prejudgment interest would be awarded. The "venerable . . . rule" at common law was that prejudgment interest was unavailable on claims for unliquidated or, even more significantly, unascertainable damages. *Milwaukee* v. *Cement Div., National Gypsum Co.*, 515 U. S. 189, 197 (1995). Contrary to the Court's suggestion, see *ante*, at 9–11, 13–14, that rule had not been abandoned by the period between 1943 and 1949, the years of the Compact's negotiation and ultimate approval by Congress. By that time, the state of the law in general regarding awards of prejudgment interest for unliquidated claims was uncertain at best, as the Court itself recognizes. See *ante*, at 9–11, and n. 3; cf. *ante*, at 13–14; see also *Funkhouser* v. *J. B. Preston Co.*, 290 U. S. 163, 168 (1933) (noting "the numerous, and not harmonious, decisions upon the allowance of interest in the case of unliquidated claims," and that "the rule with respect to unliquidated claims has been in evolution"). To be sure, we had by

then, along with other courts, criticized the common law rule that prejudgment interest was recoverable on claims for liquidated, but not for unliquidated, damages. See *ibid.* But in the absence of a statute providing for such interest, many courts, including our own, still denied and would continue to deny prejudgment interest on claims for unliquidated and unascertainable damages in a great many, and probably most, circumstances. See, *e. g.*, *Board of Comm'rs of Jackson Cty.* v. *United States*, 308 U. S. 343, 353 (1939); *Blau* v. *Lehman*, 368 U. S. 403, 414 (1962); *Lineman* v. *Schmid*, 32 Cal. 2d 204, 211, 195 P. 2d 408, 412 (1948) (Although "there is authority to the effect that the distinction formerly existing between liquidated and unliquidated demands is practically obliterated, . . . further reading . . . discloses, with citation of many cases, that the general rule is almost uniformly adhered to, namely, that interest is not allowable where the damages depend upon no fixed standard and cannot be made certain except by accord, verdict or decree"); D. Dobbs, Remedies § 3.5, p. 165 (1973) ("Most courts, in the absence of a statute to the contrary, would not award interest on unliquidated pecuniary claims, the amount of which could not be ascertained or computed, even in theory, without a trial"); see generally C. McCormick, Law of Damages § 51, p. 210 (1935) (explaining evolution of rule in America); see also 1 D. Dobbs, Law of Remedies § 3.6(1), p. 336 (2d ed. 1993) ("The most significant limitation on the recovery of prejudgment interest is the general rule that, apart from statute, prejudgment interest is not recoverable on claims that are neither liquidated as a dollar sum nor ascertainable by fixed standards" (footnotes omitted)).

Awards of such interest on claims for unliquidated and unascertainable damages for breach of a contract appear to have been rarer still. See, *e. g.*, *Williams* v. *Idaho Potato Starch Co.*, 73 Idaho 13, 24, 245 P. 2d 1045, 1051–1052 (1952); *Meyer* v. *Strom*, 37 Wash. 2d 818, 829–830, 226 P. 2d 218, 224 (1951); *Lineman* v. *Schmid*, *supra*, at 207–213, 195 P. 2d, at

410–413; see also 3 Williston on Contracts § 1413, p. 2508 (1920) ("Interest is not generally allowed . . . where market rates or prices furnish no definite or exact test of the amount due" (footnote omitted)); 1 T. Sedgwick, Measure of Damages § 312, p. 614 (9th ed. 1912) ("Generally speaking, no interest can be recovered for breach of a contract, where the damages are in their nature unliquidated, until the amount is ascertained" (footnote omitted)). In fact, at the time, they were not allowed in either Colorado or Kansas. See, *e. g.*, *Clark* v. *Giacomini*, 85 Colo. 530, 536–537, 277 P. 306, 308 (1929); *Denver Horse Imp. Co.* v. *Schafer*, 58 Colo. 376, 390, 147 P. 367, 372 (1915); *Roe* v. *Snattinger*, 91 Kan. 567, 568, 138 P. 581, 582 (1914); *Evans* v. *Moseley*, 84 Kan. 322, 332–333, 114 P. 374, 378 (1911).

Finally, and most important to this case, an award of prejudgment interest on unliquidated and unascertainable damages for breach of an interstate compact was unheard of at the time of the Compact's negotiation and approval. Unlike cases involving bonds or other instruments of credit, see, *e. g.*, *Virginia* v. *West Virginia*, *supra*, at 232–236; *South Dakota* v. *North Carolina*, 192 U. S. 286, 317–321 (1904), monetary damages in cases of this sort, involving the apportionment of water between States, are notoriously difficult to ascertain. Indeed, despite 15 years of litigation over the Compact, and resort to a great deal of data, expert testimony, complicated methodologies, and sophisticated analyses on the subject, the final value of Kansas' damages still has yet to be determined. See *ante*, at 9, n. 2; see also Third Report §§ III to X (detailing and analyzing the numerous variables and data elements necessary to arrive at a determination of Kansas' damages). It thus is not surprising that, until 1987, we had never even suggested that monetary damages could be recovered from a State as a remedy for its violation of an interstate compact apportioning the flow of an interstate stream. And when we first allowed such damages in *Texas* v. *New Mexico*, 482 U. S. 124 (1987), we

did so partially at the behest of New Mexico, the breaching State. See *id.*, at 129–132. How, then, can one say that, at the time the Compact was negotiated and approved, its signatories could fairly be said to have intended, or at least could reasonably be said to have expected or assumed, that Kansas might recover prejudgment interest on damages caused by Colorado's breach? The necessary predicate to such a recovery was neither recognized nor even contemplated by this Court or, apparently, by the state parties to original actions of this sort, until some 40 years thence.

In light of this history, it seems inescapable that any participant in the drafting and negotiation of the Compact would, if asked at the time, have reacted with marked surprise to the notion that the Compact rendered its signatories liable for an award of prejudgment interest such as that sanctioned by the Court today. As both the Compact itself and the parties' post-Compact course of dealing make clear, the "fair intendment" of the Compact very probably was simply for the in-kind recovery of water as a remedy for its breach. The Compact says nothing about the availability of prejudgment interest on money damages as part of any remedy or, for that matter, about the availability of money damages as a remedy in the first instance. It contemplates the delivery of water from Colorado to Kansas, pure and simple. See Arkansas River Compact, reprinted in App. to Brief for Kansas A–1. When Kansas filed its complaint in this matter, "it sought only a decree commanding Colorado 'to deliver the waters of the Arkansas River in accordance with the provisions of the Arkansas River Compact.'" Third Report § XI, at 98. Cf. *Colorado* v. *Kansas*, 320 U. S. 383, 391 (1943) (discussing Kansas' prayer for relief in the form of "an apportionment in second feet or acre feet"). Not until our decision in *Texas* v. *New Mexico*, *supra*, did Kansas amend its complaint to include a claim for monetary damages. See Third Report § XI, at 98. Neither Kansas nor Colorado appears ever to have anticipated or assumed, much

less expected, that the Compact might result in a monetary award of prejudgment interest over half a century after its signing.

The Court ignores all of this in awarding prejudgment interest to Kansas, seizing instead upon the compensatory rationale behind the criticism of the common law rule and awards of prejudgment interest on unliquidated claims for damages in general. See *ante*, at 10–11. I do not dispute that awards of interest are compensatory in nature or that, as a general matter, "a monetary award does not fully compensate for an injury unless it includes an interest component." *Ante*, at 10; see also *National Gypsum Co.*, 515 U. S., at 195, n. 7. But, as the Court itself recognizes, see *ante*, at 11, our precedents make clear that, at least today and in the absence of a governing statute, awards of prejudgment interest on unliquidated claims for damages are governed not by any "rigid theory of compensation for money withheld," but rather by "considerations of fairness." *Blau*, 368 U. S., at 414 (internal quotation marks and citation omitted); see, *e. g.*, *General Motors Corp.* v. *Devex Corp.*, 461 U. S. 648, 651–653, and n. 5 (1983); *Funkhouser*, 290 U. S., at 168–169. This is especially so where, as here, we are dealing with suits by one governmental body against another. See *West Virginia* v. *United States*, 479 U. S. 305, 309–312 (1987); *Board of Comm'rs of Jackson Cty.*, 308 U. S., at 349–353.

There is nothing fair about awarding prejudgment interest as a remedy for the Compact's breach when all available evidence suggests that the signatories to the Compact neither intended nor contemplated such an unconventional remedy. Many compacts between States are old; suits involving compacts concerning water rights are late in starting and are invariably long pending; and, because statutes of limitation or the doctrine of laches is rarely available to preclude the steady buildup of prejudgment interest, the amount of such interest can become quite large, as Kansas' claim for approximately $41 million illustrates. See *ante*, at 9, n. 2. One

would think that, particularly in such circumstances, even the most rudimentary conception of fairness would dictate that the Court ought not to interpret a contract between two States as exposing one of them to liability under a novel legal principle some 50 years later without some indication that the States might have contemplated such exposure in conjunction with the contractual rights and duties expressed in their compact. Contrary to the Court's apparent belief, see *ante*, at 11–12, n. 4, nothing about such a contextualized historical approach would create an across-the-board incentive for the continued breach of interstate compacts entered into before 1987, especially given the prospect of large and uncertain damages awards. Had Kansas and Colorado anticipated or even suspected what the Court today effects, they almost certainly would have negotiated a provision in the Compact to address the situation. States in the future very likely will do so in the wake of the Court's decision, which creates a very different backdrop from the one against which Kansas and Colorado operated. In the absence of such a provision, however, "the loss [as to interest] should remain where it has fallen." *Board of Comm'rs of Jackson Cty.*, *supra*, at 353; see Third Report § XI, at 101 ("Prejudgment interest here neither takes from those who benefitted, nor goes to those who were injured").

For the foregoing reasons, I respectfully dissent from the Court's award of prejudgment interest.

Syllabus

KYLLO *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 99–8508. Argued February 20, 2001—Decided June 11, 2001

Suspicious that marijuana was being grown in petitioner Kyllo's home in a triplex, agents used a thermal-imaging device to scan the triplex to determine if the amount of heat emanating from it was consistent with the high-intensity lamps typically used for indoor marijuana growth. The scan showed that Kyllo's garage roof and a side wall were relatively hot compared to the rest of his home and substantially warmer than the neighboring units. Based in part on the thermal imaging, a Federal Magistrate Judge issued a warrant to search Kyllo's home, where the agents found marijuana growing. After Kyllo was indicted on a federal drug charge, he unsuccessfully moved to suppress the evidence seized from his home and then entered a conditional guilty plea. The Ninth Circuit ultimately affirmed, upholding the thermal imaging on the ground that Kyllo had shown no subjective expectation of privacy because he had made no attempt to conceal the heat escaping from his home. Even if he had, ruled the court, there was no objectively reasonable expectation of privacy because the thermal imager did not expose any intimate details of Kyllo's life, only amorphous hot spots on his home's exterior.

Held: Where, as here, the Government uses a device that is not in general public use, to explore details of a private home that would previously have been unknowable without physical intrusion, the surveillance is a Fourth Amendment "search," and is presumptively unreasonable without a warrant. Pp. 31–41.

(a) The question whether a warrantless search of a home is reasonable and hence constitutional must be answered no in most instances, but the antecedent question whether a Fourth Amendment "search" has occurred is not so simple. This Court has approved warrantless visual surveillance of a home, see *California* v. *Ciraolo*, 476 U. S. 207, 213, ruling that visual observation is no "search" at all, see *Dow Chemical Co.* v. *United States*, 476 U. S. 227, 234–235, 239. In assessing when a search is not a search, the Court has adapted a principle first enunciated in *Katz* v. *United States*, 389 U. S. 347, 361: A "search" does not occur—even when its object is a house explicitly protected by the Fourth Amendment—unless the individual manifested a subjective

expectation of privacy in the searched object, and society is willing to recognize that expectation as reasonable, see, *e. g.*, *California* v. *Ciraolo*, *supra*, at 211. Pp. 31–33.

(b) While it may be difficult to refine the *Katz* test in some instances, in the case of the search of a home's interior—the prototypical and hence most commonly litigated area of protected privacy—there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*. To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment. Thus, obtaining by sense-enhancing technology any information regarding the home's interior that could not otherwise have been obtained without physical "intrusion into a constitutionally protected area," *Silverman* v. *United States*, 365 U. S. 505, 512, constitutes a search—at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted. Pp. 33–35.

(c) Based on this criterion, the information obtained by the thermal imager in this case was the product of a search. The Court rejects the Government's argument that the thermal imaging must be upheld because it detected only heat radiating from the home's external surface. Such a mechanical interpretation of the Fourth Amendment was rejected in *Katz*, where the eavesdropping device in question picked up only sound waves that reached the exterior of the phone booth to which it was attached. Reversing that approach would leave the homeowner at the mercy of advancing technology—including imaging technology that could discern all human activity in the home. Also rejected is the Government's contention that the thermal imaging was constitutional because it did not detect "intimate details." Such an approach would be wrong in principle because, in the sanctity of the home, *all* details are intimate details. See, *e. g.*, *United States* v. *Karo*, 468 U. S. 705; *Dow Chemical*, *supra*, at 238, distinguished. It would also be impractical in application, failing to provide a workable accommodation between law enforcement needs and Fourth Amendment interests. See *Oliver* v. *United States*, 466 U. S. 170, 181. Pp. 35–40.

(d) Since the imaging in this case was an unlawful search, it will remain for the District Court to determine whether, without the evidence it provided, the search warrant was supported by probable cause—and if not, whether there is any other basis for supporting admission of that evidence. P. 40.

190 F. 3d 1041, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which SOUTER, THOMAS, GINSBURG, and BREYER, JJ., joined. STEVENS, J., filed a dissenting opinion, in which REHNQUIST, C. J., and O'CONNOR and KENNEDY, JJ., joined, *post*, p. 41.

Kenneth Lerner, by appointment of the Court, 531 U. S. 955, argued the cause and filed briefs for petitioner.

Deputy Solicitor General Dreeben argued the cause for the United States. With him on the brief were former *Solicitor General Waxman*, *Assistant Attorney General Robinson*, *Irving L. Gornstein*, and *Deborah Watson*.*

JUSTICE SCALIA delivered the opinion of the Court.

This case presents the question whether the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a "search" within the meaning of the Fourth Amendment.

I

In 1991 Agent William Elliott of the United States Department of the Interior came to suspect that marijuana was being grown in the home belonging to petitioner Danny Kyllo, part of a triplex on Rhododendron Drive in Florence, Oregon. Indoor marijuana growth typically requires high-intensity lamps. In order to determine whether an amount of heat was emanating from petitioner's home consistent with the use of such lamps, at 3:20 a.m. on January 16, 1992, Agent Elliott and Dan Haas used an Agema Thermovision 210 thermal imager to scan the triplex. Thermal imagers detect infrared radiation, which virtually all objects emit but which is not visible to the naked eye. The imager converts radiation into images based on relative warmth—black

*Briefs of *amici curiae* urging reversal were filed for the Liberty Project by *Julie M. Carpenter*; and for the National Association of Criminal Defense Lawyers et al. by *James J. Tomkovicz*, *Lisa B. Kemler*, and *Steven R. Shapiro*.

is cool, white is hot, shades of gray connote relative differences; in that respect, it operates somewhat like a video camera showing heat images. The scan of Kyllo's home took only a few minutes and was performed from the passenger seat of Agent Elliott's vehicle across the street from the front of the house and also from the street in back of the house. The scan showed that the roof over the garage and a side wall of petitioner's home were relatively hot compared to the rest of the home and substantially warmer than neighboring homes in the triplex. Agent Elliott concluded that petitioner was using halide lights to grow marijuana in his house, which indeed he was. Based on tips from informants, utility bills, and the thermal imaging, a Federal Magistrate Judge issued a warrant authorizing a search of petitioner's home, and the agents found an indoor growing operation involving more than 100 plants. Petitioner was indicted on one count of manufacturing marijuana, in violation of 21 U. S. C. § 841(a)(1). He unsuccessfully moved to suppress the evidence seized from his home and then entered a conditional guilty plea.

The Court of Appeals for the Ninth Circuit remanded the case for an evidentiary hearing regarding the intrusiveness of thermal imaging. On remand the District Court found that the Agema 210 "is a non-intrusive device which emits no rays or beams and shows a crude visual image of the heat being radiated from the outside of the house"; it "did not show any people or activity within the walls of the structure"; "[t]he device used cannot penetrate walls or windows to reveal conversations or human activities"; and "[n]o intimate details of the home were observed." Supp. App. to Pet. for Cert. 39–40. Based on these findings, the District Court upheld the validity of the warrant that relied in part upon the thermal imaging, and reaffirmed its denial of the motion to suppress. A divided Court of Appeals initially reversed, 140 F. 3d 1249 (1998), but that

opinion was withdrawn and the panel (after a change in composition) affirmed, 190 F. 3d 1041 (1999), with Judge Noonan dissenting. The court held that petitioner had shown no subjective expectation of privacy because he had made no attempt to conceal the heat escaping from his home, *id.*, at 1046, and even if he had, there was no objectively reasonable expectation of privacy because the imager "did not expose any intimate details of Kyllo's life," only "amorphous 'hot spots' on the roof and exterior wall," *id.*, at 1047. We granted certiorari. 530 U. S. 1305 (2000).

II

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." "At the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman* v. *United States*, 365 U. S. 505, 511 (1961). With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no. See *Illinois* v. *Rodriguez*, 497 U. S. 177, 181 (1990); *Payton* v. *New York*, 445 U. S. 573, 586 (1980).

On the other hand, the antecedent question whether or not a Fourth Amendment "search" has occurred is not so simple under our precedent. The permissibility of ordinary visual surveillance of a home used to be clear because, well into the 20th century, our Fourth Amendment jurisprudence was tied to common-law trespass. See, *e. g.*, *Goldman* v. *United States*, 316 U. S. 129, 134–136 (1942); *Olmstead* v. *United States*, 277 U. S. 438, 464–466 (1928). Cf. *Silverman* v. *United States*, *supra*, at 510–512 (technical trespass not necessary for Fourth Amendment violation; it suffices if there is "actual intrusion into a constitutionally protected area"). Visual surveillance was unquestionably lawful because "'the

eye cannot by the laws of England be guilty of a trespass.'" *Boyd* v. *United States*, 116 U. S. 616, 628 (1886) (quoting *Entick* v. *Carrington*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K. B. 1765)). We have since decoupled violation of a person's Fourth Amendment rights from trespassory violation of his property, see *Rakas* v. *Illinois*, 439 U. S. 128, 143 (1978), but the lawfulness of warrantless visual surveillance of a home has still been preserved. As we observed in *California* v. *Ciraolo*, 476 U. S. 207, 213 (1986), "[t]he Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares."

One might think that the new validating rationale would be that examining the portion of a house that is in plain public view, while it is a "search"[1] despite the absence of trespass, is not an "unreasonable" one under the Fourth Amendment. See *Minnesota* v. *Carter*, 525 U. S. 83, 104 (1998) (BREYER, J., concurring in judgment). But in fact we have held that visual observation is no "search" at all—perhaps in order to preserve somewhat more intact our doctrine that warrantless searches are presumptively unconstitutional. See *Dow Chemical Co.* v. *United States*, 476 U. S. 227, 234–235, 239 (1986). In assessing when a search is not a search, we have applied somewhat in reverse the principle first enunciated in *Katz* v. *United States*, 389 U. S. 347 (1967). *Katz* involved eavesdropping by means of an electronic listening device placed on the outside of a telephone booth—a location not within the catalog ("persons, houses, papers, and effects") that the Fourth Amendment protects against unreasonable searches. We held that the

[1] When the Fourth Amendment was adopted, as now, to "search" meant "[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as, to *search* the house for a book; to *search* the wood for a thief." N. Webster, An American Dictionary of the English Language 66 (1828) (reprint 6th ed. 1989).

Fourth Amendment nonetheless protected Katz from the warrantless eavesdropping because he "justifiably relied" upon the privacy of the telephone booth. *Id.*, at 353. As Justice Harlan's oft-quoted concurrence described it, a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable. See *id.*, at 361. We have subsequently applied this principle to hold that a Fourth Amendment search does *not* occur—even when the explicitly protected location of a *house* is concerned—unless "the individual manifested a subjective expectation of privacy in the object of the challenged search," and "society [is] willing to recognize that expectation as reasonable." *Ciraolo*, *supra*, at 211. We have applied this test in holding that it is not a search for the police to use a pen register at the phone company to determine what numbers were dialed in a private home, *Smith* v. *Maryland*, 442 U. S. 735, 743–744 (1979), and we have applied the test on two different occasions in holding that aerial surveillance of private homes and surrounding areas does not constitute a search, *Ciraolo*, *supra*; *Florida* v. *Riley*, 488 U. S. 445 (1989).

The present case involves officers on a public street engaged in more than naked-eye surveillance of a home. We have previously reserved judgment as to how much technological enhancement of ordinary perception from such a vantage point, if any, is too much. While we upheld enhanced aerial photography of an industrial complex in *Dow Chemical*, we noted that we found "it important that this is *not* an area immediately adjacent to a private home, where privacy expectations are most heightened," 476 U. S., at 237, n. 4 (emphasis in original).

III

It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been

entirely unaffected by the advance of technology. For example, as the cases discussed above make clear, the technology enabling human flight has exposed to public view (and hence, we have said, to official observation) uncovered portions of the house and its curtilage that once were private. See *Ciraolo, supra,* at 215. The question we confront today is what limits there are upon this power of technology to shrink the realm of guaranteed privacy.

The *Katz* test—whether the individual has an expectation of privacy that society is prepared to recognize as reasonable—has often been criticized as circular, and hence subjective and unpredictable. See 1 W. LaFave, Search and Seizure §2.1(d), pp. 393–394 (3d ed. 1996); Posner, The Uncertain Protection of Privacy by the Supreme Court, 1979 S. Ct. Rev. 173, 188; *Carter, supra,* at 97 (SCALIA, J., concurring). But see *Rakas, supra,* at 143–144, n. 12. While it may be difficult to refine *Katz* when the search of areas such as telephone booths, automobiles, or even the curtilage and uncovered portions of residences is at issue, in the case of the search of the interior of homes—the prototypical and hence most commonly litigated area of protected privacy—there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists,* and that is acknowledged to be *reasonable.* To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment. We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical "intrusion into a constitutionally protected area," *Silverman,* 365 U. S., at 512, constitutes a search—at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted. On the basis of this criterion, the

information obtained by the thermal imager in this case was the product of a search.[2]

The Government maintains, however, that the thermal imaging must be upheld because it detected "only heat radiating from the external surface of the house," Brief for United States 26. The dissent makes this its leading point, see *post*, at 41, contending that there is a fundamental difference between what it calls "off-the-wall" observations and "through-the-wall surveillance." But just as a thermal imager captures only heat emanating from a house, so also a powerful directional microphone picks up only sound emanating from a house—and a satellite capable of scanning from many miles away would pick up only visible light emanating from a house. We rejected such a mechanical interpretation of the Fourth Amendment in *Katz*, where the eavesdropping device picked up only sound waves that reached the exterior of the phone booth. Reversing that approach would leave the homeowner at the mercy of advancing technology—including imaging technology that could discern all human

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[2] The dissent's repeated assertion that the thermal imaging did not obtain information regarding the interior of the home, *post*, at 43, 44 (opinion of STEVENS, J.), is simply inaccurate. A thermal imager reveals the relative heat of various rooms in the home. The dissent may not find that information particularly private or important, see *post*, at 43–44, 45, 49–50, but there is no basis for saying it is not information regarding the interior of the home. The dissent's comparison of the thermal imaging to various circumstances in which outside observers might be able to perceive, without technology, the heat of the home—for example, by observing snowmelt on the roof, *post*, at 43—is quite irrelevant. The fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment. The police might, for example, learn how many people are in a particular house by setting up year-round surveillance; but that does not make breaking and entering to find out the same information lawful. In any event, on the night of January 16, 1992, no outside observer could have discerned the relative heat of Kyllo's home without thermal imaging.

activity in the home. While the technology used in the present case was relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development.[3] The dissent's reliance on the distinction between "off-the-wall" and "through-the-wall" observation is entirely incompatible with the dissent's belief, which we discuss below, that thermal-imaging observations of the intimate details of a home are impermissible. The most sophisticated thermal-imaging devices continue to measure heat "off-the-wall" rather than "through-the-wall"; the dissent's disapproval of those more sophisticated thermal-imaging devices, see *post*, at 49, is an acknowledgment that there is no substance to this distinction. As for the dissent's extraordinary assertion that anything learned through "an inference" cannot be a search, see *post*, at 44, that would validate even the "through-the-wall" technologies that the dissent purports to disapprove. Surely the dissent does not believe that the through-the-wall radar or ultrasound technology produces an 8-by-10 Kodak glossy that needs no analysis (*i. e.*, the making of inferences). And, of course, the novel proposition that inference insulates a search is blatantly contrary to *United States* v. *Karo*, 468 U. S. 705 (1984), where the police "inferred" from the activation of a beeper that a certain can of ether was in the home. The police ac-

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[3] The ability to "see" through walls and other opaque barriers is a clear, and scientifically feasible, goal of law enforcement research and development. The National Law Enforcement and Corrections Technology Center, a program within the United States Department of Justice, features on its Internet Website projects that include a "Radar-Based Through-the-Wall Surveillance System," "Handheld Ultrasound Through the Wall Surveillance," and a "Radar Flashlight" that "will enable law enforcement officers to detect individuals through interior building walls." www.nlectc.org/techproj/ (visited May 3, 2001). Some devices may emit low levels of radiation that travel "through-the-wall," but others, such as more sophisticated thermal-imaging devices, are entirely passive, or "off-the-wall" as the dissent puts it.

tivity was held to be a search, and the search was held unlawful.[4]

The Government also contends that the thermal imaging was constitutional because it did not "detect private activities occurring in private areas," Brief for United States 22. It points out that in *Dow Chemical* we observed that the enhanced aerial photography did not reveal any "intimate details." 476 U. S., at 238. *Dow Chemical*, however, involved enhanced aerial photography of an industrial complex, which does not share the Fourth Amendment sanctity of the home. The Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained. In *Silverman*, for example, we made clear that any physical invasion of the structure of the home, "by even a fraction of an inch," was too much, 365 U. S., at 512, and there is certainly no exception to the warrant requirement for the officer who barely cracks open the front door and sees nothing but the nonintimate rug on the vestibule floor. In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes. Thus, in *Karo*, *supra*, the only thing detected was a can of ether in the

[4] The dissent asserts, *post*, at 44–45, n. 3, that we have misunderstood its point, which is not that inference *insulates* a search, but that inference alone is *not* a search. If we misunderstood the point, it was only in a good-faith effort to render the point germane to the case at hand. The issue in this case is not the police's allegedly unlawful inferencing, but their allegedly unlawful thermal-imaging measurement of the emanations from a house. We say such measurement is a search; the dissent says it is not, because an inference is not a search. We took that to mean that, since the technologically enhanced emanations had to be the basis of inferences before anything inside the house could be known, the use of the emanations could not be a search. But the dissent certainly knows better than we what it intends. And if it means only that an inference is not a search, we certainly agree. That has no bearing, however, upon whether hi-tech measurement of emanations from a house is a search.

home; and in *Arizona* v. *Hicks*, 480 U. S. 321 (1987), the only thing detected by a physical search that went beyond what officers lawfully present could observe in "plain view" was the registration number of a phonograph turntable. These were intimate details because they were details of the home, just as was the detail of how warm—or even how relatively warm—Kyllo was heating his residence.[5]

Limiting the prohibition of thermal imaging to "intimate details" would not only be wrong in principle; it would be impractical in application, failing to provide "a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment," *Oliver* v. *United States*, 466 U. S. 170, 181 (1984). To begin with, there is no necessary connection between the sophistication of the surveillance equipment and the "intimacy" of the details that it observes—which means that one cannot say (and the police cannot be assured) that use of the relatively crude equipment at issue here will always be lawful. The Agema Thermovision 210 might disclose, for example, at what hour each night the lady of the house takes her daily sauna and bath—a detail that many would consider "intimate"; and a much more sophisticated system might detect nothing more intimate than the fact that someone left a closet light on. We could not, in other words, develop a rule approving only that through-the-wall surveillance which identifies objects no smaller than 36 by 36 inches, but would have to develop a jurisprudence specifying which

[5]The Government cites our statement in *California* v. *Ciraolo*, 476 U. S. 207 (1986), noting apparent agreement with the State of California that aerial surveillance of a house's curtilage could become "'invasive'" if "'modern technology'" revealed "'those intimate associations, objects or activities otherwise imperceptible to police or fellow citizens.'" *Id.*, at 215, n. 3 (quoting Brief for State of California 14–15). We think the Court's focus in this secondhand dictum was not upon intimacy but upon otherwise-imperceptibility, which is precisely the principle we vindicate today.

home activities are "intimate" and which are not. And even when (if ever) that jurisprudence were fully developed, no police officer would be able to know *in advance* whether his through-the-wall surveillance picks up "intimate" details—and thus would be unable to know in advance whether it is constitutional.

The dissent's proposed standard—whether the technology offers the "functional equivalent of actual presence in the area being searched," *post*, at 47—would seem quite similar to our own at first blush. The dissent concludes that *Katz* was such a case, but then inexplicably asserts that if the same listening device only revealed the volume of the conversation, the surveillance would be permissible, *post*, at 49–50. Yet if, without technology, the police could not discern volume without being actually present in the phone booth, JUSTICE STEVENS should conclude a search has occurred. Cf. *Karo*, 468 U. S., at 735 (STEVENS, J., concurring in part and dissenting in part) ("I find little comfort in the Court's notion that no invasion of privacy occurs until a listener obtains some significant information by use of the device. . . . A bathtub is a less private area when the plumber is present even if his back is turned"). The same should hold for the interior heat of the home if only a person present in the home could discern the heat. Thus the driving force of the dissent, despite its recitation of the above standard, appears to be a distinction among different types of information—whether the "homeowner would even care if anybody noticed," *post*, at 50. The dissent offers no practical guidance for the application of this standard, and for reasons already discussed, we believe there can be none. The people in their houses, as well as the police, deserve more precision.[6]

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[6]The dissent argues that we have injected potential uncertainty into the constitutional analysis by noting that whether or not the technology is in general public use may be a factor. See *post*, at 47. That quarrel,

We have said that the Fourth Amendment draws "a firm line at the entrance to the house," *Payton*, 445 U. S., at 590. That line, we think, must be not only firm but also bright—which requires clear specification of those methods of surveillance that require a warrant. While it is certainly possible to conclude from the videotape of the thermal imaging that occurred in this case that no "significant" compromise of the homeowner's privacy has occurred, we must take the long view, from the original meaning of the Fourth Amendment forward.

> "The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens." *Carroll* v. *United States*, 267 U. S. 132, 149 (1925).

Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a "search" and is presumptively unreasonable without a warrant.

Since we hold the Thermovision imaging to have been an unlawful search, it will remain for the District Court to determine whether, without the evidence it provided, the search warrant issued in this case was supported by probable cause—and if not, whether there is any other basis for supporting admission of the evidence that the search pursuant to the warrant produced.

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however, is not with us but with this Court's precedent. See *Ciraolo*, *supra*, at 215 ("In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet"). Given that we can quite confidently say that thermal imaging is not "routine," we decline in this case to reexamine that factor.

* * *

The judgment of the Court of Appeals is reversed; the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE KENNEDY join, dissenting.

There is, in my judgment, a distinction of constitutional magnitude between "through-the-wall surveillance" that gives the observer or listener direct access to information in a private area, on the one hand, and the thought processes used to draw inferences from information in the public domain, on the other hand. The Court has crafted a rule that purports to deal with direct observations of the inside of the home, but the case before us merely involves indirect deductions from "off-the-wall" surveillance, that is, observations of the exterior of the home. Those observations were made with a fairly primitive thermal imager that gathered data exposed on the outside of petitioner's home but did not invade any constitutionally protected interest in privacy.[1] Moreover, I believe that the supposedly "bright-line" rule the Court has created in response to its concerns about future technological developments is unnecessary, unwise, and inconsistent with the Fourth Amendment.

I

There is no need for the Court to craft a new rule to decide this case, as it is controlled by established principles from

[1] After an evidentiary hearing, the District Court found:

"[T]he use of the thermal imaging device here was not an intrusion into Kyllo's home. No intimate details of the home were observed, and there was no intrusion upon the privacy of the individuals within the home. The device used cannot penetrate walls or windows to reveal conversations or human activities. The device recorded only the heat being emitted from the home." Supp. App. to Pet. for Cert. 40.

our Fourth Amendment jurisprudence. One of those core principles, of course, is that "searches and seizures *inside a home* without a warrant are presumptively unreasonable." *Payton* v. *New York*, 445 U. S. 573, 586 (1980) (emphasis added). But it is equally well settled that searches and seizures of property in plain view are presumptively reasonable. See *id.*, at 586–587.[2] Whether that property is residential or commercial, the basic principle is the same: "'What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.'" *California* v. *Ciraolo*, 476 U. S. 207, 213 (1986) (quoting *Katz* v. *United States*, 389 U. S. 347, 351 (1967)); see *Florida* v. *Riley*, 488 U. S. 445, 449–450 (1989); *California* v. *Greenwood*, 486 U. S. 35, 40–41 (1988); *Dow Chemical Co.* v. *United States*, 476 U. S. 227, 235–236 (1986); *Air Pollution Variance Bd. of Colo.* v. *Western Alfalfa Corp.*, 416 U. S. 861, 865 (1974). That is the principle implicated here.

While the Court "take[s] the long view" and decides this case based largely on the potential of yet-to-be-developed technology that might allow "through-the-wall surveillance," *ante*, at 38–40; see *ante*, at 36, n. 3, this case involves nothing more than off-the-wall surveillance by law enforcement officers to gather information exposed to the general public from the outside of petitioner's home. All that the infrared camera did in this case was passively measure heat emitted

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[2] Thus, for example, we have found consistent with the Fourth Amendment, even absent a warrant, the search and seizure of garbage left for collection outside the curtilage of a home, *California* v. *Greenwood*, 486 U. S. 35 (1988); the aerial surveillance of a fenced-in backyard from an altitude of 1,000 feet, *California* v. *Ciraolo*, 476 U. S. 207 (1986); the aerial observation of a partially exposed interior of a residential greenhouse from 400 feet above, *Florida* v. *Riley*, 488 U. S. 445 (1989); the aerial photography of an industrial complex from several thousand feet above, *Dow Chemical Co.* v. *United States*, 476 U. S. 227 (1986); and the observation of smoke emanating from chimney stacks, *Air Pollution Variance Bd. of Colo.* v. *Western Alfalfa Corp.*, 416 U. S. 861 (1974).

from the exterior surfaces of petitioner's home; all that those measurements showed were relative differences in emission levels, vaguely indicating that some areas of the roof and outside walls were warmer than others. As still images from the infrared scans show, see Appendix, *infra*, no details regarding the interior of petitioner's home were revealed. Unlike an x-ray scan, or other possible "through-the-wall" techniques, the detection of infrared radiation emanating from the home did not accomplish "an unauthorized physical penetration into the premises," *Silverman* v. *United States*, 365 U. S. 505, 509 (1961), nor did it "obtain information that it could not have obtained by observation from outside the curtilage of the house," *United States* v. *Karo*, 468 U. S. 705, 715 (1984).

Indeed, the ordinary use of the senses might enable a neighbor or passerby to notice the heat emanating from a building, particularly if it is vented, as was the case here. Additionally, any member of the public might notice that one part of a house is warmer than another part or a nearby building if, for example, rainwater evaporates or snow melts at different rates across its surfaces. Such use of the senses would not convert into an unreasonable search if, instead, an adjoining neighbor allowed an officer onto her property to verify her perceptions with a sensitive thermometer. Nor, in my view, does such observation become an unreasonable search if made from a distance with the aid of a device that merely discloses that the exterior of one house, or one area of the house, is much warmer than another. Nothing more occurred in this case.

Thus, the notion that heat emissions from the outside of a dwelling are a private matter implicating the protections of the Fourth Amendment (the text of which guarantees the right of people "to be secure *in* their . . . houses" against unreasonable searches and seizures (emphasis added)) is not only unprecedented but also quite difficult to take seriously. Heat waves, like aromas that are generated in a kitchen, or

in a laboratory or opium den, enter the public domain if and when they leave a building. A subjective expectation that they would remain private is not only implausible but also surely not "one that society is prepared to recognize as 'reasonable.'" *Katz*, 389 U. S., at 361 (Harlan, J., concurring).

To be sure, the homeowner has a reasonable expectation of privacy concerning what takes place within the home, and the Fourth Amendment's protection against physical invasions of the home should apply to their functional equivalent. But the equipment in this case did not penetrate the walls of petitioner's home, and while it did pick up "details of the home" that were exposed to the public, *ante*, at 38, it did not obtain "any information regarding the *interior* of the home," *ante*, at 34 (emphasis added). In the Court's own words, based on what the thermal imager "showed" regarding the outside of petitioner's home, the officers "concluded" that petitioner was engaging in illegal activity inside the home. *Ante*, at 30. It would be quite absurd to characterize their thought processes as "searches," regardless of whether they inferred (rightly) that petitioner was growing marijuana in his house, or (wrongly) that "the lady of the house [was taking] her daily sauna and bath." *Ante*, at 38. In either case, the only conclusions the officers reached concerning the interior of the home were at least as indirect as those that might have been inferred from the contents of discarded garbage, see *California* v. *Greenwood*, 486 U. S. 35 (1988), or pen register data, see *Smith* v. *Maryland*, 442 U. S. 735 (1979), or, as in this case, subpoenaed utility records, see 190 F. 3d 1041, 1043 (CA9 1999). For the first time in its history, the Court assumes that an inference can amount to a Fourth Amendment violation. See *ante*, at 36–37.[3]

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[3] Although the Court credits us with the "novel proposition that inference insulates a search," *ante*, at 36, our point simply is that an inference cannot *be* a search, contrary to the Court's reasoning. See *supra* this page. Thus, the Court's use of *United States* v. *Karo*, 468 U. S. 705

Notwithstanding the implications of today's decision, there is a strong public interest in avoiding constitutional litigation over the monitoring of emissions from homes, and over the inferences drawn from such monitoring. Just as "the police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public," *Greenwood*, 486 U. S., at 41, so too public officials should not have to avert their senses or their equipment from detecting emissions in the public domain such as excessive heat, traces of smoke, suspicious odors, odorless gases, airborne particulates, or radioactive emissions, any of which could identify hazards to the community. In my judgment, monitoring such emissions with "sense-enhancing technology," *ante*, at 34, and drawing useful conclusions from such monitoring, is an entirely reasonable public service.

On the other hand, the countervailing privacy interest is at best trivial. After all, homes generally are insulated to keep heat in, rather than to prevent the detection of heat going out, and it does not seem to me that society will suffer from a rule requiring the rare homeowner who both intends to engage in uncommon activities that produce extraordinary amounts of heat, and wishes to conceal that production from outsiders, to make sure that the surrounding area is well insulated. Cf. *United States* v. *Jacobsen*, 466 U. S. 109, 122 (1984) ("The concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however well

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(1984), to refute a point we do not make underscores the fact that the Court has no real answer (either in logic or in law) to the point we do make. Of course, *Karo* itself does not provide any support for the Court's view that inferences can amount to unconstitutional searches. The illegality in that case was "the monitoring of a beeper in a private residence" to obtain information that "could not have [been] obtained by observation from outside," *id.*, at 714–715, rather than any thought processes that flowed from such monitoring.

justified, that certain facts will not come to the attention of the authorities"). The interest in concealing the heat escaping from one's house pales in significance to "the chief evil against which the wording of the Fourth Amendment is directed," the "physical entry of the home," *United States* v. *United States Dist. Court for Eastern Dist. of Mich.*, 407 U. S. 297, 313 (1972), and it is hard to believe that it is an interest the Framers sought to protect in our Constitution.

Since what was involved in this case was nothing more than drawing inferences from off-the-wall surveillance, rather than any "through-the-wall" surveillance, the officers' conduct did not amount to a search and was perfectly reasonable.[4]

II

Instead of trying to answer the question whether the use of the thermal imager in this case was even arguably unreasonable, the Court has fashioned a rule that is intended to provide essential guidance for the day when "more sophisticated systems" gain the "ability to 'see' through walls and other opaque barriers." *Ante*, at 36, and n. 3. The newly minted rule encompasses "obtaining [1] by sense-enhancing technology [2] any information regarding the interior of the home [3] that could not otherwise have been obtained without physical intrusion into a constitutionally protected area . . . [4] at least where (as here) the technology in question is not in general public use." *Ante*, at 34 (internal quotation marks omitted). In my judgment, the

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[4] This view comports with that of all the Courts of Appeals that have resolved the issue. See 190 F. 3d 1041 (CA9 1999); *United States* v. *Robinson*, 62 F. 3d 1325 (CA11 1995) (upholding warrantless use of thermal imager); *United States* v. *Myers*, 46 F. 3d 668 (CA7 1995) (same); *United States* v. *Ishmael*, 48 F. 3d 850 (CA5 1995) (same); *United States* v. *Pinson*, 24 F. 3d 1056 (CA8 1994) (same). But see *United States* v. *Cusumano*, 67 F. 3d 1497 (CA10 1995) (warrantless use of thermal imager violated Fourth Amendment), vacated and decided on other grounds, 83 F. 3d 1247 (CA10 1996) (en banc).

Court's new rule is at once too broad and too narrow, and is not justified by the Court's explanation for its adoption. As I have suggested, I would not erect a constitutional impediment to the use of sense-enhancing technology unless it provides its user with the functional equivalent of actual presence in the area being searched.

Despite the Court's attempt to draw a line that is "not only firm but also bright," *ante*, at 40, the contours of its new rule are uncertain because its protection apparently dissipates as soon as the relevant technology is "in general public use," *ante*, at 34. Yet how much use is general public use is not even hinted at by the Court's opinion, which makes the somewhat doubtful assumption that the thermal imager used in this case does not satisfy that criterion.[5] In any event, putting aside its lack of clarity, this criterion is somewhat perverse because it seems likely that the threat to privacy will grow, rather than recede, as the use of intrusive equipment becomes more readily available.

It is clear, however, that the category of "sense-enhancing technology" covered by the new rule, *ibid.*, is far too broad. It would, for example, embrace potential mechanical substitutes for dogs trained to react when they sniff narcotics. But in *United States* v. *Place*, 462 U. S. 696, 707 (1983), we held that a dog sniff that "discloses only the presence or absence of narcotics" does "not constitute a 'search' within the meaning of the Fourth Amendment," and it must follow that sense-enhancing equipment that identifies nothing but illegal

[5] The record describes a device that numbers close to a thousand manufactured units; that has a predecessor numbering in the neighborhood of 4,000 to 5,000 units; that competes with a similar product numbering from 5,000 to 6,000 units; and that is "readily available to the public" for commercial, personal, or law enforcement purposes, and is just an 800-number away from being rented from "half a dozen national companies" by anyone who wants one. App. 18. Since, by virtue of the Court's new rule, the issue is one of first impression, perhaps it should order an evidentiary hearing to determine whether these facts suffice to establish "general public use."

activity is not a search either. Nevertheless, the use of such a device would be unconstitutional under the Court's rule, as would the use of other new devices that might detect the odor of deadly bacteria or chemicals for making a new type of high explosive, even if the devices (like the dog sniffs) are "so limited both in the manner in which" they obtain information and "in the content of the information" they reveal. *Ibid.* If nothing more than that sort of information could be obtained by using the devices in a public place to monitor emissions from a house, then their use would be no more objectionable than the use of the thermal imager in this case.

The application of the Court's new rule to "any information regarding the interior of the home," *ante*, at 34, is also unnecessarily broad. If it takes sensitive equipment to detect an odor that identifies criminal conduct and nothing else, the fact that the odor emanates from the interior of a home should not provide it with constitutional protection. See *supra*, at 47 and this page. The criterion, moreover, is too sweeping in that information "regarding" the interior of a home apparently is not just information obtained through its walls, but also information concerning the outside of the building that could lead to (however many) inferences "regarding" what might be inside. Under that expansive view, I suppose, an officer using an infrared camera to observe a man silently entering the side door of a house at night carrying a pizza might conclude that its interior is now occupied by someone who likes pizza, and by doing so the officer would be guilty of conducting an unconstitutional "search" of the home.

Because the new rule applies to information regarding the "interior" of the home, it is too narrow as well as too broad. Clearly, a rule that is designed to protect individuals from the overly intrusive use of sense-enhancing equipment should not be limited to a home. If such equipment

did provide its user with the functional equivalent of access to a private place—such as, for example, the telephone booth involved in *Katz*, or an office building—then the rule should apply to such an area as well as to a home. See *Katz*, 389 U. S., at 351 ("[T]he Fourth Amendment protects people, not places").

The final requirement of the Court's new rule, that the information "could not otherwise have been obtained without physical intrusion into a constitutionally protected area," *ante*, at 34 (internal quotation marks omitted), also extends too far as the Court applies it. As noted, the Court effectively treats the mental process of analyzing data obtained from external sources as the equivalent of a physical intrusion into the home. See *supra*, at 44. As I have explained, however, the process of drawing inferences from data in the public domain should not be characterized as a search.

The two reasons advanced by the Court as justifications for the adoption of its new rule are both unpersuasive. First, the Court suggests that its rule is compelled by our holding in *Katz*, because in that case, as in this, the surveillance consisted of nothing more than the monitoring of waves emanating from a private area into the public domain. See *ante*, at 35. Yet there are critical differences between the cases. In *Katz*, the electronic listening device attached to the outside of the phone booth allowed the officers to pick up the content of the conversation inside the booth, making them the functional equivalent of intruders because they gathered information that was otherwise available only to someone inside the private area; it would be as if, in this case, the thermal imager presented a view of the heat-generating activity inside petitioner's home. By contrast, the thermal imager here disclosed only the relative amounts of heat radiating from the house; it would be as if, in *Katz*, the listening device disclosed only the rela-

tive volume of sound leaving the booth, which presumably was discernible in the public domain.[6] Surely, there is a significant difference between the general and well-settled expectation that strangers will not have direct access to the contents of private communications, on the one hand, and the rather theoretical expectation that an occasional homeowner would even care if anybody noticed the relative amounts of heat emanating from the walls of his house, on the other. It is pure hyperbole for the Court to suggest that refusing to extend the holding of *Katz* to this case would leave the homeowner at the mercy of "technology that could discern all human activity in the home." *Ante*, at 35–36.

Second, the Court argues that the permissibility of "through-the-wall surveillance" cannot depend on a distinction between observing "intimate details" such as "the lady of the house [taking] her daily sauna and bath," and noticing only "the nonintimate rug on the vestibule floor" or "objects no smaller than 36 by 36 inches." *Ante*, at 37, 38–39. This entire argument assumes, of course, that the thermal imager in this case could or did perform "through-the-wall surveillance" that could identify any detail "that would previously have been unknowable without physical intrusion." *Ante*, at 39–40. In fact, the device could not, see n. 1, *supra*, and did not, see Appendix, *infra*, enable its user to identify either the lady of the house, the rug on the vestibule floor, or anything else inside the house, whether smaller or larger than 36 by 36 inches. Indeed, the vague thermal images of petitioner's home that are reproduced in the Appendix were submitted by him to the District Court as part of an expert report raising the question whether the device could even take "accurate, consistent infrared images" of the

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[6] The use of the latter device would be constitutional given *Smith* v. *Maryland*, 442 U. S. 735, 741 (1979), which upheld the use of pen registers to record numbers dialed on a phone because, unlike "the listening device employed in *Katz* . . . pen registers do not acquire the *contents* of communications."

outside of his house. Defendant's Exh. 107, p. 4. But even if the device could reliably show extraordinary differences in the amounts of heat leaving his home, drawing the inference that there was something suspicious occurring inside the residence—a conclusion that officers far less gifted than Sherlock Holmes would readily draw—does not qualify as "through-the-wall surveillance," much less a Fourth Amendment violation.

III

Although the Court is properly and commendably concerned about the threats to privacy that may flow from advances in the technology available to the law enforcement profession, it has unfortunately failed to heed the tried and true counsel of judicial restraint. Instead of concentrating on the rather mundane issue that is actually presented by the case before it, the Court has endeavored to craft an all-encompassing rule for the future. It would be far wiser to give legislators an unimpeded opportunity to grapple with these emerging issues rather than to shackle them with prematurely devised constitutional constraints.

I respectfully dissent.

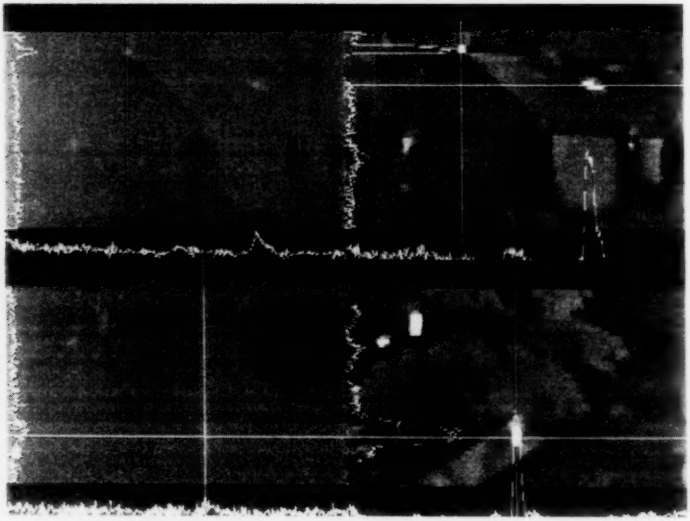
[Appendix to opinion of STEVENS, J., follows this page.]

APPENDIX TO OPINION OF STEVENS, J.

(Images and text reproduced from defendant's exhibit 107)

Top left: Infrared image of a video frame from the videotape submitted as evidence in this case. The thermogram indicates the suspect house as it appeared with the Gain and contrast in its default setting. Only the outline of the house is visible. The camera used was the Thermovision 210.

Top Right: Infrared image of a subsequent videoframe taken from the videotape. The gain and contrast settings have been increased in order to make the walls and roof of the structure appear hotter than what it actually is.



Bottom Left: Infrared image of the opposite side of the suspects house. The thermogram is also taken from the same videotape. The camera settings are in the default mode and the outline of the house is barely visible. Only the hot electrical transformer and the street light are identifiable.

Bottom Right: The same image, but with the gain and contrast increased. This change in camera settings cause any object to appear hotter than what it actually is. The arrow indicates the overloading of an area immediately around a hot object in this case the electrical transformer and the streetlight. This overloading of the image is an inherent design flaw in the camera itself.

Syllabus

TUAN ANH NGUYEN ET AL. *v.* IMMIGRATION AND NATURALIZATION SERVICE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 99–2071. Argued January 9, 2001—Decided June 11, 2001

Petitioner Tuan Anh Nguyen was born out of wedlock in Vietnam to a Vietnamese citizen and copetitioner Joseph Boulais, a United States citizen. Nguyen became a lawful permanent United States resident at age six and was raised by Boulais. At age 22, Nguyen pleaded guilty in a Texas state court to two counts of sexual assault on a child. Subsequently, respondent Immigration and Naturalization Service initiated deportation proceedings against him based on his serious criminal offenses. The Immigration Judge ordered him deportable. Boulais obtained an order of parentage from a state court while Nguyen's appeal was pending before the Board of Immigration Appeals, but the Board dismissed the appeal, rejecting Nguyen's citizenship claim because he had not complied with 8 U. S. C. § 1409(a)'s requirements for one born out of wedlock and abroad to a citizen father and a noncitizen mother. On appeal, the Fifth Circuit rejected petitioners' claim that § 1409 violates equal protection by providing different citizenship rules for children born abroad and out of wedlock depending on whether the citizen parent is the mother or the father.

Held: Section 1409 is consistent with the equal protection guarantee embedded in the Fifth Amendment's Due Process Clause. Pp. 59–73.

(a) A child born abroad and out of wedlock acquires at birth the nationality status of a citizen mother who meets a specified residency requirement. § 1409(c). However, when the father is the citizen parent, *inter alia*, one of three affirmative steps must be taken before the child turns 18: legitimization, a declaration of paternity under oath by the father, or a court order of paternity. § 1409(a)(4). The failure to satisfy this section renders Nguyen ineligible for citizenship. Pp. 59–60.

(b) A gender-based classification withstands equal protection scrutiny if it serves important governmental objectives and the discriminatory means employed are substantially related to the achievement of those objectives. *United States* v. *Virginia*, 518 U. S. 515, 533. Congress' decision to impose different requirements on unmarried fathers and unmarried mothers is based on the significant difference between their respective relationships to the potential citizen at the time

of birth and is justified by two important governmental interests. Pp. 60–71.

(1) The first such interest is the importance of assuring that a biological parent-child relationship exists. The mother's relation is verifiable from the birth itself and is documented by the birth certificate or hospital records and the witnesses to the birth. However, a father need not be present at the birth, and his presence is not incontrovertible proof of fatherhood. See *Lehr* v. *Robertson*, 463 U. S. 248, 260, n. 16. Because fathers and mothers are not similarly situated with regard to proof of biological parenthood, the imposition of different rules for each is neither surprising nor troublesome from a constitutional perspective. Section 1409(a)(4)'s provision of three options is designed to ensure acceptable documentation of paternity. Petitioners argue that § 1409(a)(1)'s requirement that a father provide clear and convincing evidence of parentage is sufficient to achieve the end of establishing paternity, given the sophistication of modern DNA tests. However, that section does not mandate DNA testing. Moreover, the Constitution does not require that Congress elect one particular mechanism from among many possible methods of establishing paternity, and § 1409(a)(4) represents a reasonable legislative conclusion that the satisfaction of one of several alternatives will suffice to establish the father-child blood link required as a predicate to the child's acquisition of citizenship. Finally, even a facially neutral rule would sometimes require fathers to take additional affirmative steps which would not be required of mothers, whose names will be on the birth certificate as a result of their presence at the birth, and who will have the benefit of witnesses to the birth to call upon. Pp. 62–64.

(2) The second governmental interest furthered by § 1409(a)(4) is the determination to ensure that the child and citizen parent have some demonstrated opportunity to develop a relationship that consists of real, everyday ties providing a connection between child and citizen parent and, in turn, the United States. Such an opportunity inheres in the event of birth in the case of a citizen mother and her child, but does not result as a matter of biological inevitability in the case of an unwed father. He may not know that a child was conceived, and a mother may be unsure of the father's identity. One concern in this context has always been with young men on duty with the Armed Forces in foreign countries. Today, the ease of travel and willingness of Americans to visit foreign countries have resulted in numbers of trips abroad that must be of real concern when contemplating the prospect of mandating, contrary to Congress' wishes, citizenship by male parentage subject to no condition other than the father's residence in this country. Equal protection principles do not require Congress to ignore this

reality. Section 1409 takes the unremarkable step of ensuring that the opportunity inherent in the event of birth as to the mother-child relationship exists between father and child before citizenship is conferred upon the latter. That interest's importance is too profound to be satisfied by a DNA test because scientific proof of biological paternity does not, by itself, ensure father-child contact during the child's minority. Congress is well within its authority in refusing, absent proof of an opportunity for a relationship to develop, to commit this country to embracing a child as a citizen. Contrary to petitioners' argument, § 1409 does not embody a gender-based stereotype. There is nothing irrational or improper in recognizing that at the moment of birth—a critical event in the statutory scheme and tradition of citizenship law—the mother's knowledge of the child and the fact of parenthood have been established in a way not guaranteed to the unwed father. Pp. 64–68.

(3) The means Congress chose substantially relate to its interest in facilitating a parent-child relationship. First, various statutory provisions, in addition to § 1409(a), require that some act linking a child to the United States occur before the child turns 18. Second, petitioners' argument that § 1409(a)(4) reflects a stereotype that women are more likely than men to actually establish the required relationship misconceives both the governmental interest's nature and the equal protection inquiry. As to the former, Congress could have chosen to advance the interest of ensuring a meaningful relationship in every case, but it enacted instead an easily administered scheme to promote the different but still substantial interest of ensuring an opportunity for that relationship to develop. Petitioners' argument confuses the equal protection inquiry's means and ends; § 1409(a)(4) should not be invalidated because Congress elected to advance an interest that is less demanding to satisfy than some alternative. Even if one conceives of Congress' real interest as the establishment of a meaningful relationship, it is almost axiomatic that a policy seeking to foster the opportunity for meaningful parent-child bonds to develop has a close and substantial bearing on the governmental interest in that bond's formation. Here, Congress' means are in substantial furtherance of an important governmental objective, and the fit between the means and that end is exceedingly persuasive. See *Virginia*, *supra*, at 533. Pp. 68–70.

(c) Section 1409(a)(4) imposes a minimal obligation. Only the least onerous of its three options must be satisfied; and it can be satisfied on the day of birth, or the next day, or for the next 18 years. Section 1409(a), moreover, is not the sole means of attaining citizenship for the child, who can seek citizenship in his or her own right, rather than via reliance on parental ties. Pp. 70–71.

(d) Because the statute satisfies the equal protection scrutiny applied to gender-based qualifications, this Court need not consider whether it can confer citizenship on terms other than those specified by Congress or assess the implications of statements in earlier cases regarding the wide deference afforded to Congress in exercising its immigration and naturalization power. Pp. 71–73.

208 F. 3d 528, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, SCALIA, and THOMAS, JJ., joined. SCALIA, J., filed a concurring opinion, in which THOMAS, J., joined, *post*, p. 73. O'CONNOR, J., filed a dissenting opinion, in which SOUTER, GINSBURG, and BREYER, JJ., joined, *post*, p. 74.

Martha F. Davis argued the cause for petitioners. With her on the briefs were *Nancy A. Falgout, Steven R. Shapiro, Lucas Guttentag, Julie Goldscheid,* and *Sherry J. Leiwant.*

Deputy Solicitor General Kneedler argued the cause for respondent. With him on the brief were *Solicitor General Waxman, Assistant Attorney General Ogden, Austin C. Schlick, Michael Jay Singer,* and *John S. Koppel.**

JUSTICE KENNEDY delivered the opinion of the Court.

This case presents a question not resolved by a majority of the Court in a case before us three Terms ago. See *Miller* v. *Albright*, 523 U. S. 420 (1998). Title 8 U. S. C. § 1409 governs the acquisition of United States citizenship by persons born to one United States citizen parent and one noncitizen parent when the parents are unmarried and the child is born outside of the United States or its possessions. The statute imposes different requirements for the child's acquisition of citizenship depending upon whether the citizen parent is

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*Briefs of *amici curiae* urging reversal were filed for Equality Now et al. by *Ogden Northrup Lewis* and *Jessica Neuwirth;* and for the National Women's Law Center et al. by *Nancy Duff Campbell, Joan Entmacher, Dina R. Lassow,* and *Nancy L. Perkins.*

Moses Silverman and *Kenneth Kimerling* filed a brief for the Asian American Legal Defense and Education Fund, Inc., as *amicus curiae.*

the mother or the father. The question before us is whether the statutory distinction is consistent with the equal protection guarantee embedded in the Due Process Clause of the Fifth Amendment.

I

Petitioner Tuan Anh Nguyen was born in Saigon, Vietnam, on September 11, 1969, to copetitioner Joseph Boulais and a Vietnamese citizen. Boulais and Nguyen's mother were not married. Boulais always has been a citizen of the United States, and he was in Vietnam under the employ of a corporation. After he and Nguyen's mother ended their relationship, Nguyen lived for a time with the family of Boulais' new Vietnamese girlfriend. In June 1975, Nguyen, then almost six years of age, came to the United States. He became a lawful permanent resident and was raised in Texas by Boulais.

In 1992, when Nguyen was 22, he pleaded guilty in a Texas state court to two counts of sexual assault on a child. He was sentenced to eight years in prison on each count. Three years later, the United States Immigration and Naturalization Service (INS) initiated deportation proceedings against Nguyen as an alien who had been convicted of two crimes involving moral turpitude, as well as an aggravated felony. See 8 U. S. C. §§ 1227(a)(2)(A)(ii) and (iii) (1994 ed., Supp. IV). Though later he would change his position and argue he was a United States citizen, Nguyen testified at his deportation hearing that he was a citizen of Vietnam. The Immigration Judge found him deportable.

Nguyen appealed to the Board of Immigration Appeals and, in 1998, while the matter was pending, his father obtained an order of parentage from a state court, based on DNA testing. By this time, Nguyen was 28 years old. The Board dismissed Nguyen's appeal, rejecting his claim to United States citizenship because he had failed to establish compliance with 8 U. S. C. § 1409(a), which sets forth the re-

quirements for one who was born out of wedlock and abroad to a citizen father and a noncitizen mother.

Nguyen and Boulais appealed to the Court of Appeals for the Fifth Circuit, arguing that § 1409 violates equal protection by providing different rules for attainment of citizenship by children born abroad and out of wedlock depending upon whether the one parent with American citizenship is the mother or the father. The court rejected the constitutional challenge to § 1409(a). 208 F. 3d 528, 535 (2000).

The constitutionality of the distinction between unwed fathers and mothers was argued in *Miller*, but a majority of the Court did not resolve the issue. Four Justices, in two different opinions, rejected the challenge to the gender-based distinction, two finding the statute consistent with the Fifth Amendment, see 523 U. S., at 423 (opinion of STEVENS, J., joined by REHNQUIST, C. J.), and two concluding that the court could not confer citizenship as a remedy even if the statute violated equal protection, see *id.*, at 452 (SCALIA, J., joined by THOMAS, J., concurring in judgment). Three Justices reached a contrary result, and would have found the statute violative of equal protection. *Id.*, at 460 (GINSBURG, J., joined by SOUTER and BREYER, JJ., dissenting); *id.*, at 471 (BREYER, J., joined by SOUTER and GINSBURG, JJ., dissenting). Finally, two Justices did not reach the issue as to the father, having determined that the child, the only petitioner in *Miller*, lacked standing to raise the equal protection rights of his father. *Id.*, at 445 (O'CONNOR, J., joined by KENNEDY, J., concurring in judgment).

Since *Miller*, the Courts of Appeal have divided over the constitutionality of § 1409. Compare 208 F. 3d 528 (CA5 2000) (case below) with *Lake* v. *Reno*, 226 F. 3d 141 (CA2 2000), and *United States* v. *Ahumada-Aguilar*, 189 F. 3d 1121 (CA9 1999). We granted certiorari to resolve the conflict. 530 U. S. 1305 (2000). The father is before the Court in this case; and, as all agree he has standing to raise the constitutional claim, we now resolve it. We hold that § 1409(a)

is consistent with the constitutional guarantee of equal protection.

II

The general requirement for acquisition of citizenship by a child born outside the United States and its outlying possessions and to parents who are married, one of whom is a citizen and the other of whom is an alien, is set forth in 8 U. S. C. § 1401(g). The statute provides that the child is also a citizen if, before the birth, the citizen parent had been physically present in the United States for a total of five years, at least two of which were after the parent turned 14 years of age.

As to an individual born under the same circumstances, save that the parents are unwed, § 1409(a) sets forth the following requirements where the father is the citizen parent and the mother is an alien:

> "(1) a blood relationship between the person and the father is established by clear and convincing evidence,
>
> "(2) the father had the nationality of the United States at the time of the person's birth,
>
> "(3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
>
> "(4) while the person is under the age of 18 years—
>
> "(A) the person is legitimated under the law of the person's residence or domicile,
>
> "(B) the father acknowledges paternity of the person in writing under oath, or
>
> "(C) the paternity of the person is established by adjudication of a competent court."

In addition, § 1409(a) incorporates by reference, as to the citizen parent, the residency requirement of § 1401(g).

When the citizen parent of the child born abroad and out of wedlock is the child's mother, the requirements for the transmittal of citizenship are described in § 1409(c):

> "(c) Notwithstanding the provision of subsection (a) of this section, a person born, after December 23, 1952, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year."

Section 1409(a) thus imposes a set of requirements on the children of citizen fathers born abroad and out of wedlock to a noncitizen mother that are not imposed under like circumstances when the citizen parent is the mother. All concede the requirements of §§ 1409(a)(3) and (a)(4), relating to a citizen father's acknowledgment of a child while he is under 18, were not satisfied in this case. We need not discuss § 1409(a)(3), however. It was added in 1986, after Nguyen's birth; and Nguyen falls within a transitional rule which allows him to elect application of either the current version of the statute, or the pre-1986 version, which contained no parallel to § 1409(a)(3). See Immigration and Nationality Act Amendments of 1986, 100 Stat. 3655; note following 8 U. S. C. § 1409; *Miller, supra*, at 426, n. 3, 432 (opinion of STEVENS, J.). And in any event, our ruling respecting § 1409(a)(4) is dispositive of the case. As an individual seeking citizenship under § 1409(a) must meet all of its preconditions, the failure to satisfy § 1409(a)(4) renders Nguyen ineligible for citizenship.

III

For a gender-based classification to withstand equal protection scrutiny, it must be established "'at least that the [challenged] classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives."'" *United States* v. *Virginia*, 518 U. S. 515, 533

(1996) (quoting *Mississippi Univ. for Women* v. *Hogan*, 458 U. S. 718, 724 (1982), in turn quoting *Wengler* v. *Druggists Mut. Ins. Co.*, 446 U. S. 142, 150 (1980)). For reasons to follow, we conclude § 1409 satisfies this standard. Given that determination, we need not decide whether some lesser degree of scrutiny pertains because the statute implicates Congress' immigration and naturalization power. See *Miller*, 523 U. S., at 434, n. 11 (explaining that the statute must be subjected to a standard more deferential to the congressional exercise of the immigration and naturalization power, but that "[e]ven if . . . the heightened scrutiny that normally governs gender discrimination claims applied in this context," the statute would be sustained (citations omitted)).

Before considering the important governmental interests advanced by the statute, two observations concerning the operation of the provision are in order. First, a citizen mother expecting a child and living abroad has the right to reenter the United States so the child can be born here and be a 14th Amendment citizen. From one perspective, then, the statute simply ensures equivalence between two expectant mothers who are citizens abroad if one chooses to reenter for the child's birth and the other chooses not to return, or does not have the means to do so. This equivalence is not a factor if the single citizen parent living abroad is the father. For, unlike the unmarried mother, the unmarried father as a general rule cannot control where the child will be born.

Second, although § 1409(a)(4) requires certain conduct to occur before the child of a citizen father, born out of wedlock and abroad, reaches 18 years of age, it imposes no limitations on when an individual who qualifies under the statute can claim citizenship. The statutory treatment of citizenship is identical in this respect whether the citizen parent is the mother or the father. A person born to a citizen parent of either gender may assert citizenship, assuming compliance

with statutory preconditions, regardless of his or her age. And while the conditions necessary for a citizen mother to transmit citizenship under § 1409(c) exist at birth, citizen fathers and/or their children have 18 years to satisfy the requirements of § 1409(a)(4). See *Miller, supra,* at 435 (opinion of STEVENS, J.).

The statutory distinction relevant in this case, then, is that § 1409(a)(4) requires one of three affirmative steps to be taken if the citizen parent is the father, but not if the citizen parent is the mother: legitimation; a declaration of paternity under oath by the father; or a court order of paternity. Congress' decision to impose requirements on unmarried fathers that differ from those on unmarried mothers is based on the significant difference between their respective relationships to the potential citizen at the time of birth. Specifically, the imposition of the requirement for a paternal relationship, but not a maternal one, is justified by two important governmental objectives. We discuss each in turn.

A

The first governmental interest to be served is the importance of assuring that a biological parent-child relationship exists. In the case of the mother, the relation is verifiable from the birth itself. The mother's status is documented in most instances by the birth certificate or hospital records and the witnesses who attest to her having given birth.

In the case of the father, the uncontestable fact is that he need not be present at the birth. If he is present, furthermore, that circumstance is not incontrovertible proof of fatherhood. See *Lehr* v. *Robertson,* 463 U. S. 248, 260, n. 16 (1983) ("'The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father's parental claims must be gauged by other measures'" (quoting *Caban* v. *Mohammed,* 441 U. S. 380, 397 (1979) (Stewart, J., dissenting))); *Trimble* v. *Gordon,* 430

U. S. 762, 770 (1977) ("The more serious problems of proving paternity might justify a more demanding standard for illegitimate children claiming under their fathers' estates than that required . . . under their mothers' estates . . ."). Fathers and mothers are not similarly situated with regard to the proof of biological parenthood. The imposition of a different set of rules for making that legal determination with respect to fathers and mothers is neither surprising nor troublesome from a constitutional perspective. Cf. *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 439 (1985) (explaining that the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike"); *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415 (1920). Section 1409(a)(4)'s provision of three options for a father seeking to establish paternity—legitimation, paternity oath, and court order of paternity—is designed to ensure an acceptable documentation of paternity.

Petitioners argue that the requirement of § 1409(a)(1), that a father provide clear and convincing evidence of parentage, is sufficient to achieve the end of establishing paternity, given the sophistication of modern DNA tests. Brief for Petitioners 21–24. Section 1409(a)(1) does not actually mandate a DNA test, however. The Constitution, moreover, does not require that Congress elect one particular mechanism from among many possible methods of establishing paternity, even if that mechanism arguably might be the most scientifically advanced method. With respect to DNA testing, the expense, reliability, and availability of such testing in various parts of the world may have been of particular concern to Congress. See *Miller, supra*, at 437 (opinion of STEVENS, J.). The requirement of § 1409(a)(4) represents a reasonable conclusion by the legislature that the satisfaction of one of several alternatives will suffice to establish the blood link between father and child required as a predicate to the child's acquisition of citizenship. Cf. *Lehr, supra*,

at 267–268 (upholding New York statutory requirement that gave mothers of children born out of wedlock notice of an adoption hearing, but only extended that right to fathers who mailed a postcard to a "putative fathers registry"). Given the proof of motherhood that is inherent in birth itself, it is unremarkable that Congress did not require the same affirmative steps of mothers.

Finally, to require Congress to speak without reference to the gender of the parent with regard to its objective of ensuring a blood tie between parent and child would be to insist on a hollow neutrality. As JUSTICE STEVENS pointed out in *Miller*, Congress could have required both mothers and fathers to prove parenthood within 30 days or, for that matter, 18 years, of the child's birth. 523 U. S., at 436. Given that the mother is always present at birth, but that the father need not be, the facially neutral rule would sometimes require fathers to take additional affirmative steps which would not be required of mothers, whose names will appear on the birth certificate as a result of their presence at the birth, and who will have the benefit of witnesses to the birth to call upon. The issue is not the use of gender specific terms instead of neutral ones. Just as neutral terms can mask discrimination that is unlawful, gender specific terms can mark a permissible distinction. The equal protection question is whether the distinction is lawful. Here, the use of gender specific terms takes into account a biological difference between the parents. The differential treatment is inherent in a sensible statutory scheme, given the unique relationship of the mother to the event of birth.

B

1

The second important governmental interest furthered in a substantial manner by § 1409(a)(4) is the determination to ensure that the child and the citizen parent have some demonstrated opportunity or potential to develop not just a

relationship that is recognized, as a formal matter, by the law, but one that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States. See *id.*, at 438–440 (opinion of STEVENS, J.). In the case of a citizen mother and a child born overseas, the opportunity for a meaningful relationship between citizen parent and child inheres in the very event of birth, an event so often critical to our constitutional and statutory understandings of citizenship. The mother knows that the child is in being and is hers and has an initial point of contact with him. There is at least an opportunity for mother and child to develop a real, meaningful relationship.

The same opportunity does not result from the event of birth, as a matter of biological inevitability, in the case of the unwed father. Given the 9-month interval between conception and birth, it is not always certain that a father will know that a child was conceived, nor is it always clear that even the mother will be sure of the father's identity. This fact takes on particular significance in the case of a child born overseas and out of wedlock. One concern in this context has always been with young people, men for the most part, who are on duty with the Armed Forces in foreign countries. See Department of Defense, Selected Manpower Statistics 48, 74 (1999) (reporting that in 1969, the year in which Nguyen was born, there were 3,458,072 active duty military personnel, 39,506 of whom were female); Department of Defense, Selected Manpower Statistics 29 (1970) (noting that 1,041,094 military personnel were stationed in foreign countries in 1969); Department of Defense, Selected Manpower Statistics 49, 76 (1999) (reporting that in 1999 there were 1,385,703 active duty military personnel, 200,287 of whom were female); *id.*, at 33 (noting that 252,763 military personnel were stationed in foreign countries in 1999).

When we turn to the conditions which prevail today, we find that the passage of time has produced additional and even more substantial grounds to justify the statutory dis-

tinction. The ease of travel and the willingness of Americans to visit foreign countries have resulted in numbers of trips abroad that must be of real concern when we contemplate the prospect of accepting petitioners' argument, which would mandate, contrary to Congress' wishes, citizenship by male parentage subject to no condition save the father's previous length of residence in this country. In 1999 alone, Americans made almost 25 million trips abroad, excluding trips to Canada and Mexico. See U. S. Dept. of Commerce, 1999 Profile of U. S. Travelers to Overseas Destinations 1 (Oct. 2000). Visits to Canada and Mexico add to this figure almost 34 million additional visits. See U. S. Dept. of Commerce, U. S. Resident Travel to Overseas Countries, Historical Visitation 1989–1999, p. 1 (Oct. 2000). And the average American overseas traveler spent 15.1 nights out of the United States in 1999. 1999 Profile of U. S. Travelers to Overseas Destinations, *supra*, at 4.

Principles of equal protection do not require Congress to ignore this reality. To the contrary, these facts demonstrate the critical importance of the Government's interest in ensuring some opportunity for a tie between citizen father and foreign born child which is a reasonable substitute for the opportunity manifest between mother and child at the time of birth. Indeed, especially in light of the number of Americans who take short sojourns abroad, the prospect that a father might not even know of the conception is a realistic possibility. See *Miller*, *supra*, at 439 (opinion of STEVENS, J.). Even if a father knows of the fact of conception, moreover, it does not follow that he will be present at the birth of the child. Thus, unlike the case of the mother, there is no assurance that the father and his biological child will ever meet. Without an initial point of contact with the child by a father who knows the child is his own, there is no opportunity for father and child to begin a relationship. Section 1409 takes the unremarkable step of ensuring that such an opportunity, inherent in the event of birth as to the

mother-child relationship, exists between father and child before citizenship is conferred upon the latter.

The importance of the governmental interest at issue here is too profound to be satisfied merely by conducting a DNA test. The fact of paternity can be established even without the father's knowledge, not to say his presence. Paternity can be established by taking DNA samples even from a few strands of hair, years after the birth. See Federal Judicial Center, Reference Manual on Scientific Evidence 497 (2d ed. 2000). Yet scientific proof of biological paternity does nothing, by itself, to ensure contact between father and child during the child's minority.

Congress is well within its authority in refusing, absent proof of at least the opportunity for the development of a relationship between citizen parent and child, to commit this country to embracing a child as a citizen entitled as of birth to the full protection of the United States, to the absolute right to enter its borders, and to full participation in the political process. If citizenship is to be conferred by the unwitting means petitioners urge, so that its acquisition abroad bears little relation to the realities of the child's own ties and allegiances, it is for Congress, not this Court, to make that determination. Congress has not taken that path but has instead chosen, by means of § 1409, to ensure in the case of father and child the opportunity for a relationship to develop, an opportunity which the event of birth itself provides for the mother and child. It should be unobjectionable for Congress to require some evidence of a minimal opportunity for the development of a relationship with the child in terms the male can fulfill.

While the INS' brief contains statements indicating the governmental interest we here describe, see Brief for Respondent 38, 41, it suggests other interests as well. Statements from the INS' brief are not conclusive as to the objects of the statute, however, as we are concerned with the objectives of Congress, not those of the INS. We ascertain the

purpose of a statute by drawing logical conclusions from its text, structure, and operation.

Petitioners and their *amici* argue in addition that, rather than fulfilling an important governmental interest, § 1409 merely embodies a gender-based stereotype. Although the above discussion should illustrate that, contrary to petitioners' assertions, § 1409 addresses an undeniable difference in the circumstance of the parents at the time a child is born, it should be noted, furthermore, that the difference does not result from some stereotype, defined as a frame of mind resulting from irrational or uncritical analysis. There is nothing irrational or improper in the recognition that at the moment of birth—a critical event in the statutory scheme and in the whole tradition of citizenship law—the mother's knowledge of the child and the fact of parenthood have been established in a way not guaranteed in the case of the unwed father. This is not a stereotype. See *Virginia*, 518 U. S., at 533 ("The heightened review standard our precedent establishes does not make sex a proscribed classification. . . . Physical differences between men and women . . . are enduring").

2

Having concluded that facilitation of a relationship between parent and child is an important governmental interest, the question remains whether the means Congress chose to further its objective—the imposition of certain additional requirements upon an unwed father—substantially relate to that end. Under this test, the means Congress adopted must be sustained.

First, it should be unsurprising that Congress decided to require that an opportunity for a parent-child relationship occur during the formative years of the child's minority. In furtherance of the desire to ensure some tie between this country and one who seeks citizenship, various other statutory provisions concerning citizenship and naturalization require some act linking the child to the United States to

occur before the child reaches 18 years of age. See, *e. g.*, 8 U. S. C. § 1431 (child born abroad to one citizen parent and one noncitizen parent shall become a citizen if, *inter alia*, the noncitizen parent is naturalized before the child reaches 18 years of age and the child begins to reside in the United States before he or she turns 18); § 1432 (imposing same conditions in the case of a child born abroad to two alien parents who are naturalized).

Second, petitioners argue that § 1409(a)(4) is not effective. In particular, petitioners assert that, although a mother will know of her child's birth, "knowledge that one is a parent, no matter how it is acquired, does not guarantee a relationship with one's child." Brief for Petitioners 16. They thus maintain that the imposition of the additional requirements of § 1409(a)(4) only on the children of citizen fathers must reflect a stereotype that women are more likely than men to actually establish a relationship with their children. *Id.*, at 17.

This line of argument misconceives the nature of both the governmental interest at issue and the manner in which we examine statutes alleged to violate equal protection. As to the former, Congress would of course be entitled to advance the interest of ensuring an actual, meaningful relationship in every case before citizenship is conferred. Or Congress could excuse compliance with the formal requirements when an actual father-child relationship is proved. It did neither here, perhaps because of the subjectivity, intrusiveness, and difficulties of proof that might attend an inquiry into any particular bond or tie. Instead, Congress enacted an easily administered scheme to promote the different but still substantial interest of ensuring at least an opportunity for a parent-child relationship to develop. Petitioners' argument confuses the means and ends of the equal protection inquiry; § 1409(a)(4) should not be invalidated because Congress elected to advance an interest that is less demanding to satisfy than some other alternative.

Even if one conceives of the interest Congress pursues as the establishment of a real, practical relationship of considerable substance between parent and child in every case, as opposed simply to ensuring the potential for the relationship to begin, petitioners' misconception of the nature of the equal protection inquiry is fatal to their argument. A statute meets the equal protection standard we here apply so long as it is "'"substantially related to the achievement of"'" the governmental objective in question. *Virginia, supra,* at 533 (quoting *Hogan,* 458 U. S., at 724, in turn quoting *Wengler,* 446 U. S., at 150). It is almost axiomatic that a policy which seeks to foster the opportunity for meaningful parent-child bonds to develop has a close and substantial bearing on the governmental interest in the actual formation of that bond. None of our gender-based classification equal protection cases have required that the statute under consideration must be capable of achieving its ultimate objective in every instance. In this difficult context of conferring citizenship on vast numbers of persons, the means adopted by Congress are in substantial furtherance of important governmental objectives. The fit between the means and the important end is "exceedingly persuasive." See *Virginia, supra,* at 533. We have explained that an "exceedingly persuasive justification" is established "by showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Hogan, supra,* at 724 (citations omitted). Section 1409 meets this standard.

C

In analyzing § 1409(a)(4), we are mindful that the obligation it imposes with respect to the acquisition of citizenship by the child of a citizen father is minimal. This circumstance shows that Congress has not erected inordinate and unnecessary hurdles to the conferral of citizenship on the

children of citizen fathers in furthering its important objectives. Only the least onerous of the three options provided for in § 1409(a)(4) must be satisfied. If the child has been legitimated under the law of the relevant jurisdiction, that will be the end of the matter. See § 1409(a)(4)(A). In the alternative, a father who has not legitimated his child by formal means need only make a written acknowledgment of paternity under oath in order to transmit citizenship to his child, hardly a substantial burden. See § 1409(a)(4)(B). Or, the father could choose to obtain a court order of paternity. See § 1409(a)(4)(C). The statute can be satisfied on the day of birth, or the next day, or for the next 18 years. In this case, the unfortunate, even tragic, circumstance is that Boulais did not pursue, or perhaps did not know of, these simple steps and alternatives. Any omission, however, does not nullify the statutory scheme.

Section 1409(a), moreover, is not the sole means by which the child of a citizen father can attain citizenship. An individual who fails to comply with § 1409(a), but who has substantial ties to the United States, can seek citizenship in his or her own right, rather than via reliance on ties to a citizen parent. See, *e. g.*, 8 U. S. C. §§ 1423, 1427. This option now may be foreclosed to Nguyen, but any bar is due to the serious nature of his criminal offenses, not to an equal protection denial or to any supposed rigidity or harshness in the citizenship laws.

IV

The statutory scheme's satisfaction of the equal protection scrutiny we apply to gender-based classifications constitutes a sufficient basis for upholding it. It should be noted, however, that, even were we to conclude that the statute did not meet this standard of review, petitioners would face additional obstacles before they could prevail.

The INS urges that, irrespective of whether § 1409(a) is constitutional, the Court cannot grant the relief petitioners request: the conferral of citizenship on terms other than

those specified by Congress. There may well be "potential problems with fashioning a remedy" were we to find the statute unconstitutional. See *Miller*, 523 U. S., at 451 (O'CONNOR, J., concurring in judgment); cf. *id.*, at 445, n. 26 (opinion of STEVENS, J.) (declining to address the question whether the Court could confer the sought-after remedy). Two Members of today's majority said in *Miller* that this argument was dispositive. See *id.*, at 452–459 (SCALIA, J., joined by THOMAS, J., concurring in judgment). Petitioners ask us to invalidate and sever §§ 1409(a)(3) and (a)(4), but it must be remembered that severance is based on the assumption that Congress would have intended the result. See *id.*, at 457 (SCALIA, J., concurring in judgment) (citing *New York* v. *United States*, 505 U. S. 144 (1992)). In this regard, it is significant that, although the Immigration and Nationality Act contains a general severability provision, Congress expressly provided with respect to the very subchapter of the United States Code at issue and in a provision entitled "Sole procedure" that "[a] person may only be naturalized as a citizen of the United States in the manner and under the conditions prescribed in this subchapter and not otherwise." 8 U. S. C. § 1421(d); see also *Miller*, *supra*, at 457–458 (SCALIA, J., concurring in judgment). Section 1421(d) refers to naturalization, which in turn is defined as "conferring of nationality of a state upon a person after birth." 8 U. S. C. § 1101(a)(23). Citizenship under § 1409(a) is retroactive to the date of birth, but it is a naturalization under § 1421(d) nevertheless. The conditions specified by § 1409(a) for conferral of citizenship, as a matter of definition, must take place after the child is born, in some instances taking as long as 18 years. Section 1409(a), then, is subject to the limitation imposed by § 1421(d).

In light of our holding that there is no equal protection violation, we need not rely on this argument. For the same reason, we need not assess the implications of statements in our earlier cases regarding the wide deference afforded to

Congress in the exercise of its immigration and naturalization power. See, *e. g.*, *Fiallo* v. *Bell*, 430 U. S. 787, 792–793, and n. 4 (1977) (quoting *Galvan* v. *Press*, 347 U. S. 522, 531 (1954)); 430 U. S., at 792 (quoting *Oceanic Steam Nav. Co.* v. *Stranahan*, 214 U. S. 320, 339 (1909)). These arguments would have to be considered, however, were it to be determined that § 1409 did not withstand conventional equal protection scrutiny.

V

To fail to acknowledge even our most basic biological differences—such as the fact that a mother must be present at birth but the father need not be—risks making the guarantee of equal protection superficial, and so disserving it. Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real. The distinction embodied in the statutory scheme here at issue is not marked by misconception and prejudice, nor does it show disrespect for either class. The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender.

The judgment of the Court of Appeals is

Affirmed.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring.

I remain of the view that the Court lacks power to provide relief of the sort requested in this suit—namely, conferral of citizenship on a basis other than that prescribed by Congress. See *Miller* v. *Albright*, 523 U. S. 420, 452 (1998) (SCALIA, J., concurring in judgment). A majority of the Justices in *Miller* having concluded otherwise, see *id.*, at 423 (opinion of STEVENS, J., joined by REHNQUIST, C. J.); *id.*, at 460 (GINSBURG, J., joined by SOUTER and BREYER, JJ., dissenting); *id.*, at 471 (BREYER, J., joined by SOUTER and

GINSBURG, JJ., dissenting); and a majority of the Court today proceeding on the same assumption; I think it appropriate for me to reach the merits of petitioners' equal protection claims. I join the opinion of the Court.

JUSTICE O'CONNOR, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

In a long line of cases spanning nearly three decades, this Court has applied heightened scrutiny to legislative classifications based on sex. The Court today confronts another statute that classifies individuals on the basis of their sex. While the Court invokes heightened scrutiny, the manner in which it explains and applies this standard is a stranger to our precedents. Because the Immigration and Naturalization Service (INS) has not shown an exceedingly persuasive justification for the sex-based classification embodied in 8 U. S. C. § 1409(a)(4)—*i. e.*, because it has failed to establish at least that the classification substantially relates to the achievement of important governmental objectives—I would reverse the judgment of the Court of Appeals.

I

Sex-based statutes, even when accurately reflecting the way most men or women behave, deny individuals opportunity. Such generalizations must be viewed not in isolation, but in the context of our Nation's "'long and unfortunate history of sex discrimination.'" *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U. S. 127, 136 (1994) (quoting *Frontiero* v. *Richardson*, 411 U. S. 677, 684 (1973) (plurality opinion)). Sex-based generalizations both reflect and reinforce "fixed notions concerning the roles and abilities of males and females." *Mississippi Univ. for Women* v. *Hogan*, 458 U. S. 718, 725 (1982).

For these reasons, a party who seeks to defend a statute that classifies individuals on the basis of sex "must carry the burden of showing an 'exceedingly persuasive justification' for the classification." *Id.*, at 724 (quoting *Kirchberg* v.

Feenstra, 450 U. S. 455, 461 (1981)); see also *United States* v. *Virginia*, 518 U. S. 515, 531 (1996). The defender of the classification meets this burden "only by showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Mississippi Univ. for Women*, *supra*, at 724 (quoting *Wengler* v. *Druggists Mut. Ins. Co.*, 446 U. S. 142, 150 (1980)); see also *Virginia*, 518 U. S., at 533.

Our cases provide significant guidance concerning the meaning of this standard and how a reviewing court is to apply it. This Court's instruction concerning the application of heightened scrutiny to sex-based classifications stands in stark contrast to our elucidation of the rudiments of rational basis review. To begin with, under heightened scrutiny, "[t]he burden of justification is demanding and it rests entirely on [the party defending the classification]." *Ibid.* Under rational basis scrutiny, by contrast, the defender of the classification "has no obligation to produce evidence to sustain the rationality of a statutory classification." *Heller* v. *Doe*, 509 U. S. 312, 320 (1993). Instead, "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record." *Id.*, at 320–321 (internal quotation marks and citation omitted).

Further, a justification that sustains a sex-based classification "must be genuine, not hypothesized or invented *post hoc* in response to litigation." *Virginia*, *supra*, at 533. "[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 648 (1975). Under rational basis review, by contrast, it is "'constitutionally irrelevant [what] reasoning in fact underlay the legislative decision.'" *Railroad Retirement Bd.* v. *Fritz*, 449 U. S. 166,

179 (1980) (quoting *Flemming* v. *Nestor*, 363 U. S. 603, 612 (1960)).

Heightened scrutiny does not countenance justifications that "rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Virginia*, *supra*, at 533. Rational basis review, by contrast, is much more tolerant of the use of broad generalizations about different classes of individuals, so long as the classification is not arbitrary or irrational. See, *e. g.*, *Kimel* v. *Florida Bd. of Regents*, 528 U. S. 62, 84 (2000); *Fritz*, *supra*, at 177.

Moreover, overbroad sex-based generalizations are impermissible even when they enjoy empirical support. See, *e. g.*, *J. E. B.*, *supra*, at 139, n. 11; *Craig* v. *Boren*, 429 U. S. 190, 199 (1976); *Wiesenfeld*, *supra*, at 645. Under rational basis scrutiny, however, empirical support is not even necessary to sustain a classification. See, *e. g.*, *FCC* v. *Beach Communications, Inc.*, 508 U. S. 307, 315 (1993) ("[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data").

The different burdens imposed by these equal protection standards correspond to the different duties of a reviewing court in applying each standard. The court's task in applying heightened scrutiny to a sex-based classification is clear: "Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is 'exceedingly persuasive.'" *Virginia*, 518 U. S., at 532–533. In making this determination, the court must inquire into the actual purposes of the discrimination, for "a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded." *Id.*, at 535–536; see also *id.*, at 533; *Wiesenfeld*, *supra*, at 648; *Califano* v. *Goldfarb*, 430 U. S. 199, 212–217 (1977) (plurality opinion); *id.*, at 219–221 (STEVENS, J., concurring in judgment). The

rational basis standard, on the other hand, instructs that "a classification 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Heller, supra,* at 320 (quoting *Beach Communications, supra,* at 313). This standard permits a court to hypothesize interests that might support legislative distinctions, whereas heightened scrutiny limits the realm of justification to demonstrable reality.

These different standards of equal protection review also set different bars for the magnitude of the governmental interest that justifies the statutory classification. Heightened scrutiny demands that the governmental interest served by the classification be "important," see, *e. g., Virginia, supra,* at 533, whereas rational basis scrutiny requires only that the end be "legitimate," see, *e. g., Nordlinger* v. *Hahn,* 505 U. S. 1, 10 (1992).

The most important difference between heightened scrutiny and rational basis review, of course, is the required fit between the means employed and the ends served. Under heightened scrutiny, the discriminatory means must be "substantially related" to an actual and important governmental interest. See, *e. g., Virginia, supra,* at 533. Under rational basis scrutiny, the means need only be "rationally related" to a conceivable and legitimate state end. See, *e. g., Cleburne* v. *Cleburne Living Center, Inc.,* 473 U. S. 432, 440 (1985).

The fact that other means are better suited to the achievement of governmental ends therefore is of no moment under rational basis review. See, *e. g., Vance* v. *Bradley,* 440 U. S. 93, 103, n. 20 (1979) ("Even were it not irrelevant to [rational basis review] that other alternatives might achieve approximately the same results . . ."); *Massachusetts Bd. of Retirement* v. *Murgia,* 427 U. S. 307, 316 (1976) *(per curiam)* ("[T]he State perhaps has not chosen the best means to accomplish this purpose. But where rationality is the test, a

State 'does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect' " (quoting *Dandridge* v. *Williams*, 397 U. S. 471, 485 (1970))). But because we require a much tighter fit between means and ends under heightened scrutiny, the availability of sex-neutral alternatives to a sex-based classification is often highly probative of the validity of the classification. See, *e. g.*, *Wengler*, 446 U. S., at 151 (invalidating a sex-based classification where a sex-neutral approach would completely serve the needs of both classes); *Orr* v. *Orr*, 440 U. S. 268, 281 (1979) (finding "no reason, therefore, to use sex as a proxy for need" where the alimony statute already provided for individualized hearings that took financial circumstances into account); *Wiesenfeld*, 420 U. S., at 653 (finding a gender-based distinction to be "gratuitous" where "without it, the statutory scheme would only provide benefits to those men who are in fact similarly situated to the women the statute aids").

II

The Court recites the governing substantive standard for heightened scrutiny of sex-based classifications, see *ante*, at 60–61, 70, but departs from the guidance of our precedents concerning such classifications in several ways. In the first sentence of its equal protection analysis, the majority glosses over the crucial matter of the burden of justification. *Ante*, at 60 ("For a gender-based classification to withstand equal protection scrutiny, it must be established . . ."); see also *ante*, at 70. In other circumstances, the Court's use of an impersonal construction might represent a mere elision of what we have stated expressly in our prior cases. Here, however, the elision presages some of the larger failings of the opinion.

For example, the majority hypothesizes about the interests served by the statute and fails adequately to inquire into the actual purposes of § 1409(a)(4). The Court also does not always explain adequately the importance

of the interests that it claims to be served by the provision. The majority also fails carefully to consider whether the sex-based classification is being used impermissibly "as a 'proxy for other, more germane bases of classification,'" *Mississippi Univ. for Women*, 458 U. S., at 726 (quoting *Craig*, 429 U. S., at 198), and instead casually dismisses the relevance of available sex-neutral alternatives. And, contrary to the majority's conclusion, the fit between the means and ends of § 1409(a)(4) is far too attenuated for the provision to survive heightened scrutiny. In all, the majority opinion represents far less than the rigorous application of heightened scrutiny that our precedents require.

A

According to the Court, "[t]he first governmental interest to be served is the importance of assuring that a biological parent-child relationship exists." *Ante*, at 62. The majority does not elaborate on the importance of this interest, which presumably lies in preventing fraudulent conveyances of citizenship. Nor does the majority demonstrate that this is one of the actual purposes of § 1409(a)(4). Assuming that Congress actually had this purpose in mind in enacting parts of § 1409(a)(4), cf. *Miller* v. *Albright*, 523 U. S. 420, 435–436 (1998) (opinion of STEVENS, J.), the INS does not appear to rely on this interest in its effort to sustain § 1409(a)(4)'s sex-based classification. Cf. Brief for Respondent 11 (claiming that § 1409 serves "at least two important interests: first, ensuring that children who are born abroad out of wedlock have, during their minority, attained a sufficiently recognized or formal relationship to their United States citizen parent—and thus to the United States—to justify the conferral of citizenship upon them; and second, preventing such children from being stateless"). In light of the reviewing court's duty to "determine whether the proffered justification is 'exceedingly persuasive,'" *Virginia*, 518 U. S., at 533, this disparity between the majority's defense of the statute

and the INS' proffered justifications is striking, to say the least.

The gravest defect in the Court's reliance on this interest, however, is the insufficiency of the fit between § 1409(a)(4)'s discriminatory means and the asserted end. Section 1409(c) imposes no particular burden of proof on mothers wishing to convey citizenship to their children. By contrast, § 1409(a)(1), which petitioners do not challenge before this Court, requires that "a blood relationship between the person and the father [be] established by clear and convincing evidence." Atop § 1409(a)(1), § 1409(a)(4) requires legitimation, an acknowledgment of paternity in writing under oath, or an adjudication of paternity before the child reaches the age of 18. It is difficult to see what § 1409(a)(4) accomplishes in furtherance of "assuring that a biological parent-child relationship exists," *ante*, at 62, that § 1409(a)(1) does not achieve on its own. The virtual certainty of a biological link that modern DNA testing affords reinforces the sufficiency of § 1409(a)(1). See *Miller*, *supra*, at 484–485 (BREYER, J., dissenting).

It is also difficult to see how § 1409(a)(4)'s limitation of the time allowed for obtaining proof of paternity substantially furthers the assurance of a blood relationship. Modern DNA testing, in addition to providing accuracy unmatched by other methods of establishing a biological link, essentially negates the evidentiary significance of the passage of time. Moreover, the application of § 1409(a)(1)'s "clear and convincing evidence" requirement can account for any effect that the passage of time has on the quality of the evidence.

The Court criticizes petitioners' reliance on the availability and sophistication of modern DNA tests, *ante*, at 63, but appears to misconceive the relevance of such tests. No one argues that § 1409(a)(1) mandates a DNA test. Legitimation or an adjudication of paternity, see §§ 1409(a)(4)(A), (C), may well satisfy the "clear and convincing" standard of

§ 1409(a)(1). (Satisfaction of § 1409(a)(4) by a written acknowledgment of paternity under oath, see § 1409(a)(4)(B), would seem to do little, if anything, to advance the assurance of a blood relationship, further stretching the means-end fit in this context.) Likewise, petitioners' argument does not depend on the idea that one particular method of establishing paternity is constitutionally required. Petitioners' argument rests instead on the fact that, if the goal is to obtain proof of paternity, the existence of a statutory provision governing such proof, coupled with the efficacy and availability of modern technology, is highly relevant to the sufficiency of the tailoring between § 1409(a)(4)'s sex-based classification and the asserted end. Because § 1409(a)(4) adds little to the work that § 1409(a)(1) does on its own, it is difficult to say that § 1409(a)(4) "substantially furthers" an important governmental interest. *Kirchberg*, 450 U. S., at 461.

The majority concedes that Congress could achieve the goal of assuring a biological parent-child relationship in a sex-neutral fashion, but then, in a surprising turn, dismisses the availability of sex-neutral alternatives as irrelevant. As the Court suggests, "Congress could have required both mothers and fathers to prove parenthood within 30 days or, for that matter, 18 years, of the child's birth." *Ante*, at 64 (citing *Miller*, *supra*, at 436 (opinion of STEVENS, J.)). Indeed, whether one conceives the majority's asserted interest as assuring the existence of a biological parent-child relationship, *ante*, at 62, or as ensuring acceptable documentation of that relationship, *ante*, at 63, a number of sex-neutral arrangements—including the one that the majority offers—would better serve that end. As the majority seems implicitly to acknowledge at one point, *ante*, at 62, a mother will not always have formal legal documentation of birth because a birth certificate may not issue or may subsequently be lost. Conversely, a father's name may well appear on a birth certificate. While it is doubtless true that a mother's blood re-

lation to a child is uniquely "verifiable from the birth itself" to those present at birth, *ibid.*, the majority has not shown that a mother's birth relation is uniquely verifiable *by the INS*, much less that any greater verifiability warrants a sex-based, rather than a sex-neutral, statute.

In our prior cases, the existence of comparable or superior sex-neutral alternatives has been a powerful reason to reject a sex-based classification. See *supra*, at 78. The majority, however, turns this principle on its head by denigrating as "hollow" the very neutrality that the law requires. *Ante*, at 64. While the majority trumpets the availability of superior sex-neutral alternatives as confirmation of § 1409(a)(4)'s validity, our precedents demonstrate that this fact is a decided strike *against* the law. Far from being "hollow," the avoidance of gratuitous sex-based distinctions is the hallmark of equal protection. Cf. *J. E. B.*, 511 U. S., at 152–153 (KENNEDY, J., concurring in judgment) ("'At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial [or] sexual . . . class'" (quoting *Metro Broadcasting, Inc.* v. *FCC*, 497 U. S. 547, 602 (1990) (O'CONNOR, J., dissenting))).

The majority's acknowledgment of the availability of sex-neutral alternatives scarcely confirms the point that "[t]he differential treatment is inherent in a sensible statutory scheme." *Ante*, at 64. The discussion instead demonstrates that, at most, differential *impact* will result from the fact that "[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood." *Ante*, at 63. In other words, it will likely be easier for mothers to satisfy a sex-neutral proof of parentage requirement. But facially neutral laws that have a disparate impact are a different animal for purposes of constitutional analysis than laws that specifically provide for disparate treatment. We have long held that the differential impact of a facially neutral law does not trigger heightened scrutiny, see, *e. g.*,

Washington v. *Davis*, 426 U. S. 229 (1976), whereas we apply heightened scrutiny to laws that facially classify individuals on the basis of their sex. See, *e. g.*, *United States* v. *Virginia*, 518 U. S. 515 (1996); see also *J. E. B.*, *supra*, at 152 (KENNEDY, J., concurring in judgment) ("[O]ur case law does reveal a strong presumption that gender classifications are invalid"); *Parham* v. *Hughes*, 441 U. S. 347, 351 (1979) (plurality opinion) ("Not all legislation, however, is entitled to the same presumption of validity. . . . [T]he presumption of statutory validity may also be undermined when a State has enacted legislation creating classes based upon certain other immutable human attributes" (citing, *inter alia*, *Reed* v. *Reed*, 404 U. S. 71 (1971))).

If rational basis scrutiny were appropriate in this case, then the claim that "[t]he Constitution . . . does not require that Congress elect one particular mechanism from among many possible methods of establishing paternity," *ante*, at 63, would have much greater force. So too would the claim that "[t]he requirement of § 1409(a)(4) represents a reasonable conclusion . . . ." *Ibid.* But fidelity to the Constitution's pledge of equal protection demands more when a facially sex-based classification is at issue. This is not because we sit in judgment of the wisdom of laws in one instance but not the other, cf. *Beach Communications*, 508 U. S., at 313, but rather because of the potential for "injury . . . to personal dignity," *J. E. B.*, *supra*, at 153 (KENNEDY, J., concurring in judgment), that inheres in or accompanies so many sex-based classifications.

B

The Court states that "[t]he second important governmental interest furthered in a substantial manner by § 1409(a)(4) is the determination to ensure that the child and the citizen parent have some demonstrated opportunity or potential to develop not just a relationship that is recognized, as a formal matter, by the law, but one that consists of the real,

everyday ties that provide a connection between child and citizen parent and, in turn, the United States." *Ante*, at 64–65. The Court again fails to demonstrate that this was Congress' actual purpose in enacting § 1409(a)(4). The majority's focus on "some demonstrated opportunity or potential to develop . . . real, everyday ties" in fact appears to be the type of hypothesized rationale that is insufficient under heightened scrutiny. See *supra*, at 75–77.

The INS asserts the governmental interest of "ensuring that children who are born abroad out of wedlock have, during their minority, attained a sufficiently recognized or formal relationship to their United States citizen parent—and thus to the United States—to justify the conferral of citizenship upon them." Brief for Respondent 11. The majority's asserted end, at best, is a simultaneously watered-down and beefed-up version of this interest asserted by the INS. The majority's rendition is weaker than the INS' in that it emphasizes the "opportunity or potential to develop" a relationship rather than the actual relationship about which the INS claims Congress was concerned. The majority's version is also stronger in that it goes past the formal relationship apparently desired by the INS to "real, everyday ties."

Assuming, as the majority does, that Congress was actually concerned about ensuring a "demonstrated opportunity" for a relationship, it is questionable whether such an opportunity qualifies as an "important" governmental interest apart from the existence of an actual relationship. By focusing on "opportunity" rather than reality, the majority presumably improves the chances of a sufficient means-end fit. But in doing so, it dilutes significantly the weight of the interest. It is difficult to see how, in this citizenship-conferral context, anyone profits from a "demonstrated opportunity" for a relationship in the absence of the fruition of an actual tie. Children who have an "opportunity" for such a tie with a parent, of course, may never develop an actual rela-

tionship with that parent. See *Miller*, 523 U. S., at 440 (opinion of STEVENS, J.). If a child grows up in a foreign country without any postbirth contact with the citizen parent, then the child's never-realized "opportunity" for a relationship with the citizen seems singularly irrelevant to the appropriateness of granting citizenship to that child. Likewise, where there is an actual relationship, it is the actual relationship that does all the work in rendering appropriate a grant of citizenship, regardless of when and how the opportunity for that relationship arose.

Accepting for the moment the majority's focus on "opportunity," the attempt to justify § 1409(a)(4) in these terms is still deficient. Even if it is important "to require that an opportunity for a parent-child relationship occur during the formative years of the child's minority," *ante*, at 68, it is difficult to see how the requirement that *proof* of such opportunity be obtained before the child turns 18 substantially furthers the asserted interest. As the facts of this case demonstrate, *ante*, at 57, it is entirely possible that a father and child will have the opportunity to develop a relationship and in fact will develop a relationship without obtaining the proof of the opportunity during the child's minority. After his parents' relationship had ended, petitioner Nguyen lived with the family of his father's new girlfriend. In 1975, before his sixth birthday, Nguyen came to the United States, where he was reared by his father, petitioner Boulais. In 1997, a DNA test showed a 99.98% probability of paternity, and, in 1998, Boulais obtained an order of parentage from a Texas court.

Further underscoring the gap between the discriminatory means and the asserted end is the possibility that "a child might obtain an adjudication of paternity 'absent any affirmative act by the father, and perhaps even over his express objection.'" *Miller*, 523 U. S., at 486 (BREYER, J., dissenting) (quoting *id.*, at 434 (opinion of STEVENS, J.)). The fact that the means-end fit can break down so readily

in theory, and not just in practice, is hardly characteristic of a "substantial" means-end relationship.

Moreover, available sex-neutral alternatives would at least replicate, and could easily exceed, whatever fit there is between § 1409(a)(4)'s discriminatory means and the majority's asserted end. According to the Court, § 1409(a)(4) is designed to ensure that fathers and children have the same "opportunity which the event of birth itself provides for the mother and child." *Ante*, at 67. Even assuming that this is so, Congress could simply substitute for § 1409(a)(4) a requirement that the parent be present at birth or have knowledge of birth. Cf. *Miller*, *supra*, at 487 (BREYER, J., dissenting). Congress could at least allow proof of such presence or knowledge to be one way of demonstrating an opportunity for a relationship. Under the present law, the statute on its face accords different treatment to a mother who is by nature present at birth and a father who is by choice present at birth even though those two individuals are similarly situated with respect to the "opportunity" for a relationship. The mother can transmit her citizenship at birth, but the father cannot do so in the absence of at least one other affirmative act. The different statutory treatment is solely on account of the sex of the similarly situated individuals. This type of treatment is patently inconsistent with the promise of equal protection of the laws. See, *e. g.*, *Reed*, 404 U. S., at 77 ("By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause").

Indeed, the idea that a mother's presence at birth supplies adequate assurance of an opportunity to develop a relationship while a father's presence at birth does not would appear to rest only on an overbroad sex-based generalization. A mother may not have an opportunity for a relationship if the child is removed from his or her mother on account of alleged abuse or neglect, or if the child and mother are separated by tragedy, such as disaster or war,

of the sort apparently present in this case. There is no reason, other than stereotype, to say that fathers who are present at birth lack an opportunity for a relationship on similar terms. The "[p]hysical differences between men and women," *Virginia*, 518 U. S., at 533, therefore do not justify § 1409(a)(4)'s discrimination.

The majority later ratchets up the interest, for the sake of argument, to "the establishment of a real, practical relationship of considerable substance between parent and child in every case, as opposed simply to ensuring the potential for the relationship to begin." *Ante*, at 70. But the majority then dismisses the distinction between opportunity and reality as immaterial to the inquiry in this case. *Ibid.* The majority rests its analysis of the means-end fit largely on the following proposition: "It is almost axiomatic that a policy which seeks to foster the opportunity for meaningful parent-child bonds to develop has a close and substantial bearing on the governmental interest in the actual formation of that bond." *Ibid.* A bare assertion of what is allegedly "almost axiomatic," however, is no substitute for the "demanding" burden of justification borne by the defender of the classification. *Virginia*, *supra*, at 533.

Moreover, the Court's reasoning hardly conforms to the tailoring requirement of heightened scrutiny. The fact that a discriminatory policy embodies the good intention of "seek-[ing] to foster" the opportunity for something beneficial to happen is of little relevance in itself to whether the policy substantially furthers the desired occurrence. Whether the classification indeed "has a close and substantial bearing" on the actual occurrence of the preferred result depends on facts and circumstances and must be proved by the classification's defender. Far from being a virtual axiom, the relationship between the intent to foster an opportunity and the fruition of the desired effect is merely a contingent proposition. The majority's sweeping claim is no surrogate

for the careful application of heightened scrutiny to a particular classification.

The question that then remains is the sufficiency of the fit between § 1409(a)(4)'s discriminatory means and the goal of "establish[ing] . . . a real, practical relationship of considerable substance." *Ante*, at 70. If Congress wishes to advance this end, it could easily do so by employing a sex-neutral classification that is a far "more germane bas[i]s of classification" than sex, *Craig*, 429 U. S., at 198. For example, Congress could require some degree of regular contact between the child and the citizen parent over a period of time. See *Miller*, 523 U. S., at 470 (GINSBURG, J., dissenting).

The majority again raises this possibility of the use of sex-neutral means only to dismiss it as irrelevant. The Court admits that "Congress could excuse compliance with the formal requirements when an actual father-child relationship is proved," but speculates that Congress did not do so "perhaps because of the subjectivity, intrusiveness, and difficulties of proof that might attend an inquiry into any particular bond or tie." *Ante*, at 69. We have repeatedly rejected efforts to justify sex-based classifications on the ground of administrative convenience. See, *e. g.*, *Wengler*, 446 U. S., at 152; *Frontiero*, 411 U. S., at 690–691. There is no reason to think that this is a case where administrative convenience concerns are so powerful that they would justify the sex-based discrimination, cf. *Wengler*, *supra*, at 152, especially where the use of sex as a proxy is so ill fit to the purported ends as it is here. And to the extent Congress might seek simply to ensure an "opportunity" for a relationship, little administrative inconvenience would seem to accompany a sex-neutral requirement of presence at birth, knowledge of birth, or contact between parent and child prior to a certain age.

The claim that § 1409(a)(4) substantially relates to the achievement of the goal of a "real, practical relationship"

thus finds support not in biological differences but instead in a stereotype—*i. e.*, "the generalization that mothers are significantly more likely than fathers . . . to develop caring relationships with their children." *Miller, supra,* at 482–483 (BREYER, J., dissenting). Such a claim relies on "the very stereotype the law condemns," *J. E. B.*, 511 U. S., at 138 (internal quotation marks omitted), "lends credibility" to the generalization, *Mississippi Univ. for Women*, 458 U. S., at 730, and helps to convert that "assumption" into "a self-fulfilling prophecy," *ibid.* See also *J. E. B., supra,* at 140 ("When state actors exercise peremptory challenges in reliance on gender stereotypes, they ratify and reinforce prejudicial views of the relative abilities of men and women"). Indeed, contrary to this stereotype, Boulais has reared Nguyen, while Nguyen apparently has lacked a relationship with his mother.

The majority apparently tries to avoid reliance on this stereotype by characterizing the governmental interest as a "demonstrated opportunity" for a relationship and attempting to close the gap between opportunity and reality with a dubious claim about what is "almost axiomatic." But the fact that one route is wisely forgone does not mean that the other is plausibly taken. The inescapable conclusion instead is that § 1409(a)(4) lacks an exceedingly persuasive justification.

In denying petitioner's claim that § 1409(a)(4) rests on stereotypes, the majority articulates a misshapen notion of "stereotype" and its significance in our equal protection jurisprudence. The majority asserts that a "stereotype" is "defined as a frame of mind resulting from irrational or uncritical analysis." *Ante,* at 68. This Court has long recognized, however, that an impermissible stereotype may enjoy empirical support and thus be in a sense "rational." See, *e. g., J. E. B., supra,* at 139, n. 11 ("We have made abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate the Equal Protection

Clause, even when some statistical support can be conjured up for the generalization"); *Craig*, 429 U. S., at 201 (invalidating a sex-based classification even though the evidence supporting the distinction was "not trivial in a statistical sense"); *id.*, at 202 (noting that "prior cases have consistently rejected the use of sex as a decisionmaking factor even though the statutes in question certainly rested on far more predictive empirical relationships than this"); *Wiesenfeld*, 420 U. S., at 645 (invalidating a sex-based classification even though the underlying generalization was "not entirely without empirical support"). Indeed, the stereotypes that underlie a sex-based classification "may hold true for many, even most, individuals." *Miller*, 523 U. S., at 460 (GINSBURG, J., dissenting). But in numerous cases where a measure of truth has inhered in the generalization, "the Court has rejected official actions that classify unnecessarily and overbroadly by gender when more accurate and impartial functional lines can be drawn." *Ibid.*

Nor do stereotypes consist only of those overbroad generalizations that the reviewing court considers to "show disrespect" for a class, *ante*, at 73. Cf., *e. g.*, *Craig*, *supra*, at 198–201. The hallmark of a stereotypical sex-based classification under this Court's precedents is not whether the classification is insulting, but whether it "relie[s] upon the simplistic, outdated assumption that gender could be used as a 'proxy for other, more germane bases of classification.'" *Mississippi Univ. for Women*, *supra*, at 726 (quoting *Craig*, *supra*, at 198).

It is also important to note that, while our explanations of many decisions invalidating sex-based classifications have pointed to the problems of "stereotypes" and "overbroad generalizations," these explanations certainly do not mean that the burden is on the challenger of the classification to prove legislative reliance on such generalizations. Indeed, an arbitrary distinction between the sexes may rely on no identifiable generalization at all but may simply be a de-

nial of opportunity out of pure caprice. Such a distinction, of course, would nonetheless be a classic equal protection violation. The burden of proving that use of a sex-based classification substantially relates to the achievement of an important governmental interest remains unmistakably and entirely with the classification's defender. See, *e. g.*, *Virginia*, 518 U. S., at 532–533.

C

The Court has also failed even to acknowledge the "volumes of history" to which "[t]oday's skeptical scrutiny of official action denying rights or opportunities based on sex responds." *Id.*, at 531. The history of sex discrimination in laws governing the transmission of citizenship and with respect to parental responsibilities for children born out of wedlock counsels at least some circumspection in discerning legislative purposes in this context. See generally *Miller*, *supra*, at 460–468 (GINSBURG, J., dissenting).

Section 1409 was first enacted as § 205 of the Nationality Act of 1940, 54 Stat. 1139–1140. The 1940 Act had been proposed by the President, forwarding a report by a specially convened Committee of Advisors, including the Attorney General. The Committee explained to Congress the rationale for § 205, whose sex-based classification remains in effect today:

> "[T]he Department of State has, at least since 1912, uniformly held that an illegitimate child born abroad of an American mother acquires at birth the nationality of the mother, in the absence of legitimation or adjudication establishing the paternity of the child. This ruling is based . . . on the ground that the mother in such case stands in the place of the father. . . . [U]nder American law the mother has a right to custody and control of such a child as against the putative father, and *is bound* to maintain it as its *natural guardian*. This rule seems to be in accord with the old Roman law and

with the laws of Spain and France." To Revise and Codify the Nationality Laws of the United States, Hearings on H. R. 6127 before the House Committee on Immigration and Naturalization, 76th Cong., 1st Sess., 431 (1945) (reprinting Message from the President, Nationality Laws of the United States (1938)) (emphasis added and internal quotation marks and citations omitted).

Section 1409(a)(4) is thus paradigmatic of a historic regime that left women with responsibility, and freed men from responsibility, for nonmarital children. Under this law, as one advocate explained to Congress in a 1932 plea for a sex-neutral citizenship law, "when it comes to the illegitimate child, which is a great burden, then the mother is the only recognized parent, and the father is put safely in the background." Naturalization and Citizenship Status of Certain Children of Mothers Who Are Citizens of the United States, Hearing on H. R. 5489 before the House Committee on Immigration and Naturalization, 72d Cong., 1st Sess., 3 (testimony of Burnita Shelton Matthews); see also *id.*, at 5 (citizenship law "permit[s] [the father] to escape the burdens incident to illegitimate parenthood"). Unlike § 1409(a)(4), our States' child custody and support laws no longer assume that mothers alone are "bound" to serve as "natural guardians" of nonmarital children. See, *e. g.*, Ariz. Rev. Stat. Ann. § 25–501 (1999) (equal duties of support); cf. Cal. Civ. Code Ann. § 4600 (West 1972) (abolishing "tender years" doctrine). The majority, however, rather than confronting the stereotypical notion that mothers must care for these children and fathers may ignore them, quietly condones the "very stereotype the law condemns," *J. E. B.*, 511 U. S., at 138 (internal quotation marks omitted).

Punctuating the disparity between the majority's and the INS' accounts of the governmental interests at stake is the majority's failure even to address the INS' second asserted rationale: that § 1409 prevents certain children from being stateless. Brief for Respondent 11; see also *id.*, at 17–18

(describing statelessness problem). The Court certainly has good reason to reject this asserted rationale. Indeed, the INS hardly even attempts to show how the statelessness concern justifies the discriminatory means of § 1409(a)(4) in particular. The INS instead undertakes a demonstration of how the statelessness concern justifies § 1409(c)'s relaxed residency requirements for citizen mothers. See *id.*, at 17–19, 42–43, 44, n. 23. But petitioners do not challenge here the distinction between § 1401(g), which requires that citizen fathers have previously resided in the United States for five years, including at least two years after the age of 14, and § 1409(c), which provides that a citizen mother need only have resided in the United States for one year. The INS' proffered justification of statelessness thus does nothing to buttress the case for § 1409(a)(4).

The Court also makes a number of observations that tend, on the whole, to detract and distract from the relevant equal protection inquiry. For example, presumably referring to § 1409 in general, the majority suggests that "the statute simply ensures equivalence between two expectant mothers who are citizens abroad if one chooses to reenter for the child's birth and the other chooses not to return, or does not have the means to do so." *Ante*, at 61. But even apart from the question whether this was one of Congress' actual purposes (and the majority does not affirmatively claim that it was), this equivalence is quite beside the point of petitioners' constitutional challenge, which is directed at the dissimilar treatment accorded to fathers and mothers.

The Court also states that the obligation imposed by § 1409(a)(4) is "minimal" and does not present "inordinate and unnecessary hurdles" to the acquisition of citizenship by the nonmarital child of a citizen father. *Ante*, at 70. Even assuming that the burden is minimal (and the question whether the hurdle is "unnecessary" is quite different in kind from the question whether it is burdensome), it is well settled that "the 'absence of an insurmountable barrier' will not

redeem an otherwise unconstitutionally discriminatory law." *Kirchberg*, 450 U. S., at 461 (quoting *Trimble* v. *Gordon*, 430 U. S. 762, 774 (1977)).

Finally, while the recitation of statistics concerning military personnel and overseas travel, *ante*, at 65–66, highlights the opportunities for United States citizens to interact with citizens of foreign countries, it bears little on the question whether § 1409(a)(4)'s *discriminatory means* are a permissible governmental response to those circumstances. Indeed, the majority's discussion may itself simply reflect the stereotype of male irresponsibility that is no more a basis for the validity of the classification than are stereotypes about the "traditional" behavior patterns of women.

It is, of course, true that the failure to recognize relevant differences is out of line with the command of equal protection. See *ante*, at 73. But so too do we undermine the promise of equal protection when we try to make our differences carry weight they simply cannot bear. This promise informs the proper application of heightened scrutiny to sex-based classifications and demands our scrupulous adherence to that test.

III

The Court identifies two "additional obstacles" that petitioners would face even were the Court to accept the conclusion that the statute fails heightened scrutiny. *Ante*, at 71. The first question concerns "'potential problems with fashioning a remedy.'" *Ante*, at 72 (quoting *Miller*, 523 U. S., at 451 (O'CONNOR, J., concurring in judgment) (citing *id.*, at 452–459 (SCALIA, J., concurring in judgment))). The second question concerns "the implications of statements in our earlier cases regarding the wide deference afforded to Congress in the exercise of its immigration and naturalization power." *Ante*, at 72–73. I believe that petitioners are able to surmount both of these hurdles.

As to the matter of remedy, severance of § 1409(a)(4) would have been appropriate had petitioners prevailed. Several

factors support this conclusion. The Immigration and Nationality Act (INA) contains a general severability clause, which provides: "If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby." § 406, 66 Stat. 281; see note following 8 U. S. C. § 1101, p. 38, "Separability." We have concluded that this severability clause "is unambiguous and gives rise to a presumption that Congress did not intend the validity of the [INA] as a whole, or any part of the [INA], to depend upon whether" any one provision was unconstitutional. *INS* v. *Chadha*, 462 U. S. 919, 932 (1983).

Title 8 U. S. C. § 1421(d), which states that "[a] person may only be naturalized as a citizen of the United States in the manner and under the conditions prescribed in this subchapter and not otherwise," has no effect on the operation of the INA's general severability clause in this case. Section 1421(d) governs only naturalization, which the statute defines as "the conferring of nationality of a state upon a person after birth," § 1101(a)(23), whereas §§ 1401(g) and 1409 deal with the transmission of citizenship at birth, see § 1401 ("The following shall be nationals and citizens of the United States at birth . . ."). Further, unlike the INA's general severability clause, § 1421(d) does not specifically address the scenario where a particular provision is held invalid. Indeed, the INS does not even rely on § 1421(d) in its brief.

Nor does our decision in *INS* v. *Pangilinan*, 486 U. S. 875 (1988), preclude severance here. In *Pangilinan*, this Court held that courts lack equitable authority to order the naturalization of persons who did not satisfy the statutory requirements for naturalization. *Id.*, at 883–885. Petitioners in the instant case, however, seek the exercise of no such equitable power. Petitioners instead seek severance of the offending provisions so that the statute, free of its constitutional defect, can operate to determine whether citizen-

ship was transmitted at birth. Cf. *Miller*, *supra*, at 488–489 (BREYER, J., dissenting).

In addition to the severance clause, this Court has often concluded that, in the absence of legislative direction *not* to sever the infirm provision, "extension, rather than nullification," of a benefit is more faithful to the legislative design. *Califano* v. *Westcott*, 443 U. S. 76, 89–90 (1979); see also *Weinberger* v. *Wiesenfeld*, 420 U. S. 636 (1975); *Frontiero*, 411 U. S., at 691, n. 25. The choice of extension over nullification also would have the virtue of avoiding injury to parties who are not represented in the instant litigation. And Congress, of course, remains free to redesign the statute in a manner that comports with the Constitution.

As to the question of deference, the pivotal case is *Fiallo* v. *Bell*, 430 U. S. 787 (1977). *Fiallo*, however, is readily distinguished. *Fiallo* involved constitutional challenges to various statutory distinctions, including a classification based on the sex of a United States citizen or lawful permanent resident, that determined the availability of a special immigration preference to certain aliens by virtue of their relationship with the citizen or lawful permanent resident. *Id.*, at 788–792; see also *Miller*, *supra*, at 429 (opinion of STEVENS, J.). The Court, emphasizing "the limited scope of judicial inquiry into immigration legislation," 430 U. S., at 792, rejected the constitutional challenges. The Court noted its repeated prior emphasis that "'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Ibid.* (quoting *Oceanic Steam Nav. Co.* v. *Stranahan*, 214 U. S. 320, 339 (1909)).

The instant case is not about the admission of aliens but instead concerns the logically prior question whether an individual is a citizen in the first place. A predicate for application of the deference commanded by *Fiallo* is that the individuals concerned be aliens. But whether that predicate obtains is the very matter at issue in this case. Cf. *Miller*,

523 U. S., at 433, n. 10 (opinion of STEVENS, J.) ("[T]he Government now argues . . . that an alien outside the territory of the United States has no substantive rights cognizable under the Fifth Amendment. Even if that is so, the question to be decided is whether petitioner is such an alien or whether, as [petitioner] claims, [petitioner] is a citizen. Thus, we must address the merits to determine whether the predicate for this argument is accurate" (internal quotation marks and citation omitted)). Because §§ 1401 and 1409 govern the conferral of citizenship at birth, and not the admission of aliens, the ordinary standards of equal protection review apply. See *id.*, at 480–481 (BREYER, J., dissenting).

* * *

No one should mistake the majority's analysis for a careful application of this Court's equal protection jurisprudence concerning sex-based classifications. Today's decision instead represents a deviation from a line of cases in which we have vigilantly applied heightened scrutiny to such classifications to determine whether a constitutional violation has occurred. I trust that the depth and vitality of these precedents will ensure that today's error remains an aberration. I respectfully dissent.

Syllabus

GOOD NEWS CLUB ET AL. *v.* MILFORD CENTRAL SCHOOL

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 99–2036. Argued February 28, 2001—Decided June 11, 2001

Under New York law, respondent Milford Central School (Milford) enacted a policy authorizing district residents to use its building after school for, among other things, (1) instruction in education, learning, or the arts and (2) social, civic, recreational, and entertainment uses pertaining to the community welfare. Stephen and Darleen Fournier, district residents eligible to use the school's facilities upon approval of their proposed use, are sponsors of the Good News Club, a private Christian organization for children ages 6 to 12. Pursuant to Milford's policy, they submitted a request to hold the Club's weekly afterschool meetings in the school. Milford denied the request on the ground that the proposed use—to sing songs, hear Bible lessons, memorize scripture, and pray—was the equivalent of religious worship prohibited by the community use policy. Petitioners (collectively, the Club), filed suit under 42 U. S. C. § 1983, alleging, *inter alia*, that the denial of the Club's application violated its free speech rights under the First and Fourteenth Amendments. The District Court ultimately granted Milford summary judgment, finding the Club's subject matter to be religious in nature, not merely a discussion of secular matters from a religious perspective that Milford otherwise permits. Because the school had not allowed other groups providing religious instruction to use its limited public forum, the court held that it could deny the Club access without engaging in unconstitutional viewpoint discrimination. In affirming, the Second Circuit rejected the Club's contention that Milford's restriction was unreasonable, and held that, because the Club's subject matter was quintessentially religious and its activities fell outside the bounds of pure moral and character development, Milford's policy was constitutional subject discrimination, not unconstitutional viewpoint discrimination.

Held:

1. Milford violated the Club's free speech rights when it excluded the Club from meeting after hours at the school. Pp. 106–112.

(a) Because the parties so agree, this Court assumes that Milford operates a limited public forum. A State establishing such a forum is not required to and does not allow persons to engage in every type of

speech. It may be justified in reserving its forum for certain groups or the discussion of certain topics. *E. g., Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829. The power to so restrict speech, however, is not without limits. The restriction must not discriminate against speech based on viewpoint, *ibid.*, and must be reasonable in light of the forum's purpose, *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 806. Pp. 106–107.

(b) By denying the Club access to the school's limited public forum on the ground that the Club was religious in nature, Milford discriminated against the Club because of its religious viewpoint in violation of the Free Speech Clause. That exclusion is indistinguishable from the exclusions held violative of the Clause in *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384, where a school district precluded a private group from presenting films at the school based solely on the religious perspective of the films, and in *Rosenberger*, where a university refused to fund a student publication because it addressed issues from a religious perspective. The only apparent difference between the activities of Lamb's Chapel and the Club is the inconsequential distinction that the Club teaches moral lessons from a Christian perspective through live storytelling and prayer, whereas Lamb's Chapel taught lessons through films. *Rosenberger* also is dispositive: Given the obvious religious content of the publication there at issue, it cannot be said that the Club's activities are any more "religious" or deserve any less Free Speech Clause protection. This Court disagrees with the Second Circuit's view that something that is quintessentially religious or decidedly religious in nature cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint. What matters for Free Speech Clause purposes is that there is no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons. Because Milford's restriction is viewpoint discriminatory, the Court need not decide whether it is unreasonable in light of the forum's purposes. Pp. 107–112.

2. Permitting the Club to meet on the school's premises would not have violated the Establishment Clause. Establishment Clause defenses similar to Milford's were rejected in *Lamb's Chapel*, *supra*, at 395—where the Court found that, because the films would not have been shown during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members, there was no realistic danger that the community would think that the district was endorsing religion—and in *Widmar* v. *Vincent*, 454 U. S. 263, 272–273, and n. 13—where a university's forum was

already available to other groups. Because the Club's activities are materially indistinguishable from those in *Lamb's Chapel* and *Widmar*, Milford's reliance on the Establishment Clause is unavailing. As in *Lamb's Chapel*, the Club's meetings were to be held after school hours, not sponsored by the school, and open to any student who obtained parental consent, not just to Club members. As in *Widmar*, Milford made its forum available to other organizations. The Court rejects Milford's attempt to distinguish those cases by emphasizing that its policy involves elementary school children who will perceive that the school is endorsing the Club and will feel coerced to participate because the Club's activities take place on school grounds, even though they occur during nonschool hours. That argument is unpersuasive for a number of reasons. (1) Allowing the Club to speak on school grounds would ensure, not threaten, neutrality toward religion. Accordingly, Milford faces an uphill battle in arguing that the Establishment Clause compels it to exclude the Club. See, *e. g., Rosenberger, supra*, at 839. (2) To the extent the Court considers whether the community would feel coercive pressure to engage in the Club's activities, cf. *Lee* v. *Weisman*, 505 U. S. 577, 592–593, the relevant community is the parents who choose whether their children will attend Club meetings, not the children themselves. (3) Whatever significance it may have assigned in the Establishment Clause context to the suggestion that elementary school children are more impressionable than adults, cf., *e. g., id.*, at 592, the Court has never foreclosed private religious conduct during nonschool hours merely because it takes place on school premises where elementary school children may be present. *Lee, supra*, at 592, and *Edwards* v. *Aguillard*, 482 U. S. 578, 584, distinguished. (4) Even if the Court were to consider the possible misperceptions by schoolchildren in deciding whether there is an Establishment Clause violation, the facts of this case simply do not support Milford's conclusion. Finally, it cannot be said that the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum. Because it is not convinced that there is any significance to the possibility that elementary school children may witness the Club's activities on school premises, the Court can find no reason to depart from *Lamb's Chapel* and *Widmar*. Pp. 112–119.

3. Because Milford has not raised a valid Establishment Clause claim, this Court does not address whether such a claim could excuse Milford's viewpoint discrimination. Pp. 113, 120.

202 F. 3d 502, reversed and remanded.

Syllabus

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and KENNEDY, JJ., joined, and in which BREYER, JJ., joined in part. SCALIA, J., filed a concurring opinion, *post*, p. 120. BREYER, J., filed an opinion concurring in part, *post*, p. 127. STEVENS, J., filed a dissenting opinion, *post*, p. 130. SOUTER, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 134.

Thomas Marcelle argued the cause for petitioners. With him on the briefs were *John W. Whitehead* and *Steven H. Aden*.

Frank W. Miller argued the cause for respondent. With him on the brief were *Benjamin J. Ferrara* and *Norman H. Gross*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Alabama et al. by *Bill Pryor*, Attorney General of Alabama, *Margaret L. Fleming*, *John J. Park, Jr.*, and *Charles B. Campbell*, Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *Thomas J. Miller* of Iowa, *Richard P. Ieyoub* of Louisiana, *Mike Moore* of Mississippi, *Don Stenberg* of Nebraska, *Betty D. Montgomery* of Ohio, *Charles M. Condon* of South Carolina, *Paul G. Summers* of Tennessee, *John Cornyn* of Texas, *Jan Graham* of Utah, and *Mark L. Earley* of Virginia; for the American Center for Law & Justice et al. by *Jay Alan Sekulow*, *Colby M. May*, *James M. Henderson, Sr.*, *Walter M. Weber*, *Paul D. Clement*, and *Jeffrey S. Bucholtz*; for Child Evangelism Fellowship, Inc., et al. by *Herbert G. Grey*, *Darren C. Walker*, *Gregory S. Baylor*, and *Kimberlee Wood Colby*; for the Christian Legal Society et al. by *Carl H. Esbeck* and *Nathan J. Diament*; for the Liberty Legal Institute by *Viet D. Dinh*, *John L. Carter*, and *Kelly Shackelford*; for the National Council of Churches et al. by *Carter G. Phillips*, *Gene C. Schaerr*, and *Nicholas P. Miller*; for the National Jewish Commission on Law and Public Affairs by *Nathan Lewin*, *Dennis Rapps*, and *David Zwiebel*; for the Northstar Legal Center et al. by *Jordan W. Lorence* and *Joseph Infranco*; for the Solidarity Center for Law and Justice, P. C., by *James P. Kelly III*; for Wallbuilders, Inc., by *Barry C. Hodge*; for Sally Campbell by *Brett M. Kavanaugh* and *Stuart J. Roth*; for Carol Hood by *Kevin J. Hasson*, *Eric W. Treene*, *Roman P. Storzer*, and *Anthony R. Picarello, Jr.*; for Douglas Laycock by *Mr. Laycock, pro se*; and for 20 Theologians and Scholars of Religion by *Michael W. McConnell* and *Steffen N. Johnson*.

Briefs of *amici curiae* urging affirmance were filed for the American Jewish Congress by *Mark D. Stern*; for Americans United for Separation

JUSTICE THOMAS delivered the opinion of the Court.

This case presents two questions. The first question is whether Milford Central School violated the free speech rights of the Good News Club when it excluded the Club from meeting after hours at the school. The second question is whether any such violation is justified by Milford's concern that permitting the Club's activities would violate the Establishment Clause. We conclude that Milford's restriction violates the Club's free speech rights and that no Establishment Clause concern justifies that violation.

I

The State of New York authorizes local school boards to adopt regulations governing the use of their school facilities. In particular, N. Y. Educ. Law § 414 (McKinney 2000) enumerates several purposes for which local boards may open their schools to public use. In 1992, respondent Milford Central School (Milford) enacted a community use policy adopting seven of § 414's purposes for which its building could be used after school. App. to Pet. for Cert. D1–D3. Two of the stated purposes are relevant here. First, district residents may use the school for "instruction in any branch of education, learning or the arts." *Id.*, at D1. Second, the school is available for "social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be opened to the general public." *Ibid.*

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of Church and State et al. by *Ayesha N. Khan, Steven K. Green, Steven R. Shapiro, Jerome J. Shestack, Jeffrey P. Sinensky, Eddie Tabash, Arthur N. Eisenberg,* and *Judith E. Schaeffer;* for the Anti-Defamation League et al. by *Jeffrey R. Babbin, David B. Isbell, Martin E. Karlinsky,* and *Steven M. Freeman;* for the National School Boards Association et al. by *Julie K. Underwood;* and for the New York State School Boards Association, Inc., by *Jay Worona, Pilar Sokol,* and *John A. Miller.*

Stephen and Darleen Fournier reside within Milford's district and therefore are eligible to use the school's facilities as long as their proposed use is approved by the school. Together they are sponsors of the local Good News Club, a private Christian organization for children ages 6 to 12. Pursuant to Milford's policy, in September 1996 the Fourniers submitted a request to Dr. Robert McGruder, interim superintendent of the district, in which they sought permission to hold the Club's weekly afterschool meetings in the school cafeteria. App. in No. 98–9494 (CA2), p. A–81. The next month, McGruder formally denied the Fourniers' request on the ground that the proposed use—to have "a fun time of singing songs, hearing a Bible lesson and memorizing scripture," *ibid.*—was "the equivalent of religious worship." App. H1–H2. According to McGruder, the community use policy, which prohibits use "by any individual or organization for religious purposes," foreclosed the Club's activities. App. to Pet. for Cert. D2.

In response to a letter submitted by the Club's counsel, Milford's attorney requested information to clarify the nature of the Club's activities. The Club sent a set of materials used or distributed at the meetings and the following description of its meeting:

> "The Club opens its session with Ms. Fournier taking attendance. As she calls a child's name, if the child recites a Bible verse the child receives a treat. After attendance, the Club sings songs. Next Club members engage in games that involve, *inter alia*, learning Bible verses. Ms. Fournier then relates a Bible story and explains how it applies to Club members' lives. The Club closes with prayer. Finally, Ms. Fournier distributes treats and the Bible verses for memorization." App. in No. 98–9494 (CA2), at A–30.

McGruder and Milford's attorney reviewed the materials and concluded that "the kinds of activities proposed to be

engaged in by the Good News Club were not a discussion of secular subjects such as child rearing, development of character and development of morals from a religious perspective, but were in fact the equivalent of religious instruction itself." *Id.*, at A–25. In February 1997, the Milford Board of Education adopted a resolution rejecting the Club's request to use Milford's facilities "for the purpose of conducting religious instruction and Bible study." *Id.*, at A–56.

In March 1997, petitioners, the Good News Club, Ms. Fournier, and her daughter Andrea Fournier (collectively, the Club), filed an action under Rev. Stat. § 1979, 42 U. S. C. § 1983, against Milford in the United States District Court for the Northern District of New York. The Club alleged that Milford's denial of its application violated its free speech rights under the First and Fourteenth Amendments, its right to equal protection under the Fourteenth Amendment, and its right to religious freedom under the Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U. S. C. § 2000bb *et seq.*[1]

The Club moved for a preliminary injunction to prevent the school from enforcing its religious exclusion policy against the Club and thereby to permit the Club's use of the school facilities. On April 14, 1997, the District Court granted the injunction. The Club then held its weekly afterschool meetings from April 1997 until June 1998 in a high school resource and middle school special education room. App. N12.

In August 1998, the District Court vacated the preliminary injunction and granted Milford's motion for summary judgment. 21 F. Supp. 2d 147 (NDNY 1998). The court found that the Club's "subject matter is decidedly religious in nature, and not merely a discussion of secular matters

[1] The District Court dismissed the Club's claim under the Religious Freedom Restoration Act because we held the Act to be unconstitutional in *City of Boerne* v. *Flores*, 521 U. S. 507 (1997). See 21 F. Supp. 2d 147, 150, n. 4 (NDNY 1998).

from a religious perspective that is otherwise permitted under [Milford's] use policies." *Id.*, at 154. Because the school had not permitted other groups that provided religious instruction to use its limited public forum, the court held that the school could deny access to the Club without engaging in unconstitutional viewpoint discrimination. The court also rejected the Club's equal protection claim.

The Club appealed, and a divided panel of the United States Court of Appeals for the Second Circuit affirmed. 202 F. 3d 502 (2000). First, the court rejected the Club's contention that Milford's restriction against allowing religious instruction in its facilities is unreasonable. Second, it held that, because the subject matter of the Club's activities is "quintessentially religious," *id.*, at 510, and the activities "fall outside the bounds of pure 'moral and character development,'" *id.*, at 511, Milford's policy of excluding the Club's meetings was constitutional subject discrimination, not unconstitutional viewpoint discrimination. Judge Jacobs filed a dissenting opinion in which he concluded that the school's restriction did constitute viewpoint discrimination under *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384 (1993).

There is a conflict among the Courts of Appeals on the question whether speech can be excluded from a limited public forum on the basis of the religious nature of the speech. Compare *Gentala* v. *Tucson*, 244 F. 3d 1065 (CA9 2001) (en banc) (holding that a city properly refused National Day of Prayer organizers' application to the city's civic events fund for coverage of costs for city services); *Campbell* v. *St. Tammany's School Bd.*, 206 F. 3d 482 (CA5 2000) (holding that a school's policy against permitting religious instruction in its limited public forum did not constitute viewpoint discrimination), cert. pending, No. 00–1194;* *Bronx Household of Faith* v. *Community School Dist. No. 10*, 127 F. 3d 207 (CA2 1997) (concluding that a ban on religious services and

*[REPORTER'S NOTE: See *post*, p. 913.]

instruction in the limited public forum was constitutional), with *Church on the Rock* v. *Albuquerque*, 84 F. 3d 1273 (CA10 1996) (holding that a city's denial of permission to show the film Jesus in a senior center was unconstitutional viewpoint discrimination); and *Good News/Good Sports Club* v. *School Dist. of Ladue*, 28 F. 3d 1501 (CA8 1994) (holding unconstitutional a school use policy that prohibited Good News Club from meeting during times when the Boy Scouts could meet). We granted certiorari to resolve this conflict. 531 U. S. 923 (2000).

II

The standards that we apply to determine whether a State has unconstitutionally excluded a private speaker from use of a public forum depend on the nature of the forum. See *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 44 (1983). If the forum is a traditional or open public forum, the State's restrictions on speech are subject to stricter scrutiny than are restrictions in a limited public forum. *Id.*, at 45–46. We have previously declined to decide whether a school district's opening of its facilities pursuant to N. Y. Educ. Law § 414 creates a limited or a traditional public forum. See *Lamb's Chapel*, *supra*, at 391–392. Because the parties have agreed that Milford created a limited public forum when it opened its facilities in 1992, see Brief for Petitioners 15–17; Brief for Respondent 26, we need not resolve the issue here. Instead, we simply will assume that Milford operates a limited public forum.

When the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech. The State may be justified "in reserving [its forum] for certain groups or for the discussion of certain topics." *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829 (1995); see also *Lamb's Chapel*, *supra*, at 392–393. The State's power to restrict speech, however, is not without limits. The restriction must not discriminate against speech on the basis of viewpoint,

Rosenberger, supra, at 829, and the restriction must be "reasonable in light of the purpose served by the forum," *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 806 (1985).

III

Applying this test, we first address whether the exclusion constituted viewpoint discrimination. We are guided in our analysis by two of our prior opinions, *Lamb's Chapel* and *Rosenberger.* In *Lamb's Chapel*, we held that a school district violated the Free Speech Clause of the First Amendment when it excluded a private group from presenting films at the school based solely on the films' discussions of family values from a religious perspective. Likewise, in *Rosenberger*, we held that a university's refusal to fund a student publication because the publication addressed issues from a religious perspective violated the Free Speech Clause. Concluding that Milford's exclusion of the Good News Club based on its religious nature is indistinguishable from the exclusions in these cases, we hold that the exclusion constitutes viewpoint discrimination. Because the restriction is viewpoint discriminatory, we need not decide whether it is unreasonable in light of the purposes served by the forum.[2]

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[2] Although Milford argued below that, under § 414, it could not permit its property to be used for the purpose of religious activity, see Brief for Appellee in No. 98–9494 (CA2), p. 12, here it merely asserts in one sentence that it has, "in accordance with state law, closed [its] limited open forum to purely religious instruction and services," Brief for Respondent 27. Because Milford does not elaborate, it is difficult to discern whether it is arguing that it is required by state law to exclude the Club's activities.

Before the Court of Appeals, Milford cited *Trietley* v. *Board of Ed. of Buffalo*, 65 App. Div. 2d 1, 409 N. Y. S. 2d 912 (1978), in which a New York court held that a local school district could not permit a student Bible club to meet on school property because "[r]eligious purposes are not included in the enumerated purposes for which a school may be used under section 414 of the Education Law." *Id.*, at 5–6, 409 N. Y. S. 2d,

Milford has opened its limited public forum to activities that serve a variety of purposes, including events "pertaining to the welfare of the community." App. to Pet. for Cert. D1. Milford interprets its policy to permit discussions of subjects such as child rearing, and of "the development of character and morals from a religious perspective." Brief for Appellee in No. 98–9494 (CA2), p. 6. For example, this policy would allow someone to use Aesop's Fables to teach children moral values. App. N11. Additionally, a group could sponsor a debate on whether there should be a constitutional amendment to permit prayer in public schools, *id.*, at N6, and the Boy Scouts could meet "to influence a boy's character, development and spiritual growth," *id.*, at N10–N11. In short, any group that "promote[s] the moral and character development of children" is eligible to use the school building. Brief for Appellee in No. 98–9494 (CA2), at 9.

Just as there is no question that teaching morals and character development to children is a permissible purpose under Milford's policy, it is clear that the Club teaches morals and character development to children. For example, no one disputes that the Club instructs children to overcome feelings of jealousy, to treat others well regardless of how they treat the children, and to be obedient, even if it does so in a nonsecular way. Nonetheless, because Milford found the Club's activities to be religious in nature—"the equivalent of religious instruction itself," 202 F. 3d, at 507—it excluded the Club from use of its facilities.

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at 915. Although the court conceded that the Bible clubs might provide incidental secular benefits, it nonetheless concluded that the school would have violated the Establishment Clause had it permitted the club's activities on campus. Because we hold that the exclusion of the Club on the basis of its religious perspective constitutes unconstitutional viewpoint discrimination, it is no defense for Milford that purely religious purposes can be excluded under state law.

Applying *Lamb's Chapel*,[3] we find it quite clear that Milford engaged in viewpoint discrimination when it excluded the Club from the afterschool forum. In *Lamb's Chapel*, the local New York school district similarly had adopted § 414's "social, civic or recreational use" category as a permitted use in its limited public forum. The district also prohibited use "by any group for religious purposes." 508 U. S., at 387. Citing this prohibition, the school district excluded a church that wanted to present films teaching family values from a Christian perspective. We held that, because the films "no doubt dealt with a subject otherwise permissible" under the rule, the teaching of family values, the district's exclusion of the church was unconstitutional viewpoint discrimination. *Id.*, at 394.

Like the church in *Lamb's Chapel*, the Club seeks to address a subject otherwise permitted under the rule, the teaching of morals and character, from a religious standpoint. Certainly, one could have characterized the film presentations in *Lamb's Chapel* as a religious use, as the Court of Appeals did, *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 959 F. 2d 381, 388–389 (CA2 1992). And one easily could conclude that the films' purpose to instruct that "'society's slide toward humanism . . . can only be counterbalanced by a loving home where Christian values are instilled from an early age,'" *id.*, at 384, was "quintessentially religious," 202 F. 3d, at 510. The only apparent dif-

[3] We find it remarkable that the Court of Appeals majority did not cite *Lamb's Chapel*, despite its obvious relevance to the case. We do not necessarily expect a court of appeals to catalog every opinion that reverses one of its precedents. Nonetheless, this oversight is particularly incredible because the majority's attention was directed to it at every turn. See, *e. g.*, 202 F. 3d 502, 513 (CA2 2000) (Jacobs, J., dissenting) ("I cannot square the majority's analysis in this case with *Lamb's Chapel*"); 21 F. Supp. 2d, at 150; App. O9–O11 (District Court stating "that *Lamb's Chapel* and *Rosenberger* pinpoint the critical issue in this case"); Brief for Appellee in No. 98–9494 (CA2), at 36–39; Brief for Appellants in No. 98–9494 (CA2), pp. 15, 36.

ference between the activity of Lamb's Chapel and the activities of the Good News Club is that the Club chooses to teach moral lessons from a Christian perspective through live storytelling and prayer, whereas Lamb's Chapel taught lessons through films. This distinction is inconsequential. Both modes of speech use a religious viewpoint. Thus, the exclusion of the Good News Club's activities, like the exclusion of Lamb's Chapel's films, constitutes unconstitutional viewpoint discrimination.

Our opinion in *Rosenberger* also is dispositive. In *Rosenberger*, a student organization at the University of Virginia was denied funding for printing expenses because its publication, Wide Awake, offered a Christian viewpoint. Just as the Club emphasizes the role of Christianity in students' morals and character, Wide Awake "'challenge[d] Christians to live, in word and deed, according to the faith they proclaim and . . . encourage[d] students to consider what a personal relationship with Jesus Christ means.'" 515 U. S., at 826. Because the university "select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints," we held that the denial of funding was unconstitutional. *Id.*, at 831. Although in *Rosenberger* there was no prohibition on religion as a subject matter, our holding did not rely on this factor. Instead, we concluded simply that the university's denial of funding to print Wide Awake was viewpoint discrimination, just as the school district's refusal to allow Lamb's Chapel to show its films was viewpoint discrimination. *Ibid.* Given the obvious religious content of Wide Awake, we cannot say that the Club's activities are any more "religious" or deserve any less First Amendment protection than did the publication of Wide Awake in *Rosenberger*.

Despite our holdings in *Lamb's Chapel* and *Rosenberger*, the Court of Appeals, like Milford, believed that its characterization of the Club's activities as religious in nature

warranted treating the Club's activities as different in kind from the other activities permitted by the school. See 202 F. 3d, at 510 (the Club "is doing something other than simply teaching moral values"). The "Christian viewpoint" is unique, according to the court, because it contains an "additional layer" that other kinds of viewpoints do not. *Id.*, at 509. That is, the Club "is focused on teaching children how to cultivate their relationship with God through Jesus Christ," which it characterized as "quintessentially religious." *Id.*, at 510. With these observations, the court concluded that, because the Club's activities "fall outside the bounds of pure 'moral and character development,'" the exclusion did not constitute viewpoint discrimination. *Id.*, at 511.

We disagree that something that is "quintessentially religious" or "decidedly religious in nature" cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint. See 202 F. 3d, at 512 (Jacobs, J., dissenting) ("[W]hen the subject matter is morals and character, it is quixotic to attempt a distinction between religious viewpoints and religious subject matters"). What matters for purposes of the Free Speech Clause is that we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons. It is apparent that the unstated principle of the Court of Appeals' reasoning is its conclusion that any time religious instruction and prayer are used to discuss morals and character, the discussion is simply not a "pure" discussion of those issues. According to the Court of Appeals, reliance on Christian principles taints moral and character instruction in a way that other foundations for thought or viewpoints do not. We, however, have never reached such a conclusion. Instead, we reaffirm our holdings in *Lamb's Chapel* and *Rosen-*

berger that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint. Thus, we conclude that Milford's exclusion of the Club from use of the school, pursuant to its community use policy, constitutes impermissible viewpoint discrimination.[4]

IV

Milford argues that, even if its restriction constitutes viewpoint discrimination, its interest in not violating the Establishment Clause outweighs the Club's interest in gaining equal access to the school's facilities. In other words, according to Milford, its restriction was required to avoid violating the Establishment Clause. We disagree.

We have said that a state interest in avoiding an Establishment Clause violation "may be characterized as compelling," and therefore may justify content-based discrimination.

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[4] Despite Milford's insistence that the Club's activities constitute "religious worship," the Court of Appeals made no such determination. It did compare the Club's activities to "religious worship," 202 F. 3d, at 510, but ultimately it concluded merely that the Club's activities "fall outside the bounds of pure 'moral and character development,'" *id.*, at 511. In any event, we conclude that the Club's activities do not constitute mere religious worship, divorced from any teaching of moral values.

JUSTICE SOUTER's recitation of the Club's activities is accurate. See *post*, at 137–138 (dissenting opinion). But in our view, religion is used by the Club in the same fashion that it was used by Lamb's Chapel and by the students in *Rosenberger:* Religion is the viewpoint from which ideas are conveyed. We did not find the *Rosenberger* students' attempt to cultivate a personal relationship with Christ to bar their claim that religion was a viewpoint. And we see no reason to treat the Club's use of religion as something other than a viewpoint merely because of any evangelical message it conveys. According to JUSTICE SOUTER, the Club's activities constitute "an evangelical service of worship." *Post*, at 138. Regardless of the label JUSTICE SOUTER wishes to use, what matters is the substance of the Club's activities, which we conclude are materially indistinguishable from the activities in *Lamb's Chapel* and *Rosenberger.*

Widmar v. *Vincent*, 454 U. S. 263, 271 (1981). However, it is not clear whether a State's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination. See *Lamb's Chapel*, 508 U. S., at 394–395 (noting the suggestion in *Widmar* but ultimately not finding an Establishment Clause problem). We need not, however, confront the issue in this case, because we conclude that the school has no valid Establishment Clause interest.

We rejected Establishment Clause defenses similar to Milford's in two previous free speech cases, *Lamb's Chapel* and *Widmar*. In particular, in *Lamb's Chapel*, we explained that "[t]he showing of th[e] film series would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members." 508 U. S., at 395. Accordingly, we found that "there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed." *Ibid.* Likewise, in *Widmar*, where the university's forum was already available to other groups, this Court concluded that there was no Establishment Clause problem. 454 U. S., at 272–273, and n. 13.

The Establishment Clause defense fares no better in this case. As in *Lamb's Chapel*, the Club's meetings were held after school hours, not sponsored by the school, and open to any student who obtained parental consent, not just to Club members. As in *Widmar*, Milford made its forum available to other organizations. The Club's activities are materially indistinguishable from those in *Lamb's Chapel* and *Widmar*. Thus, Milford's reliance on the Establishment Clause is unavailing.

Milford attempts to distinguish *Lamb's Chapel* and *Widmar* by emphasizing that Milford's policy involves elementary school children. According to Milford, children will perceive that the school is endorsing the Club and will feel coercive pressure to participate, because the Club's activities

take place on school grounds, even though they occur during nonschool hours.[5] This argument is unpersuasive.

First, we have held that "a significant factor in upholding governmental programs in the face of Establishment Clause attack is their *neutrality* towards religion." *Rosenberger*, 515 U. S., at 839 (emphasis added). See also *Mitchell* v. *Helms*, 530 U. S. 793, 809 (2000) (plurality opinion) ("In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, [the Court has] consistently turned to the principle of *neutrality*, upholding aid that is offered to a broad range of groups or persons without regard to their religion" (emphasis added)); *id.*, at 838 (O'CONNOR, J., concurring in judgment) ("[N]eutrality is an important reason for upholding government-aid programs against Establishment Clause challenges"). Milford's implication that granting access to the Club would do damage to the neutrality principle defies logic. For the "guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Rosenberger*, *supra*, at 839. The Good News Club seeks nothing more than to be treated neutrally and given access to speak about the same topics as are other groups. Because allowing the Club to speak on school grounds would ensure neutrality, not threaten it, Milford faces an uphill battle in arguing that the Establishment Clause compels it to exclude the Good News Club.

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[5] It is worth noting that, although Milford repeatedly has argued that the Club's meeting time directly after the schoolday is relevant to its Establishment Clause concerns, the record does not reflect any offer by the school district to permit the Club to use the facilities at a different time of day. The superintendent's stated reason for denying the applications was simply that the Club's activities were "religious instruction." 202 F. 3d, at 507. In any event, consistent with *Lamb's Chapel* and *Widmar*, the school could not deny equal access to the Club for any time that is generally available for public use.

Second, to the extent we consider whether the community would feel coercive pressure to engage in the Club's activities, cf. *Lee* v. *Weisman*, 505 U. S. 577, 592–593 (1992), the relevant community would be the parents, not the elementary school children. It is the parents who choose whether their children will attend the Good News Club meetings. Because the children cannot attend without their parents' permission, they cannot be coerced into engaging in the Good News Club's religious activities. Milford does not suggest that the parents of elementary school children would be confused about whether the school was endorsing religion. Nor do we believe that such an argument could be reasonably advanced.

Third, whatever significance we may have assigned in the Establishment Clause context to the suggestion that elementary school children are more impressionable than adults, cf., *e. g.*, *id.*, at 592; *School Dist. of Grand Rapids* v. *Ball*, 473 U. S. 373, 390 (1985) (stating that "symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice"), we have never extended our Establishment Clause jurisprudence to foreclose private religious conduct during nonschool hours merely because it takes place on school premises where elementary school children may be present.

None of the cases discussed by Milford persuades us that our Establishment Clause jurisprudence has gone this far. For example, Milford cites *Lee* v. *Weisman* for the proposition that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools," 505 U. S., at 592. In *Lee*, however, we concluded that attendance at the graduation exercise was obligatory. *Id.*, at 586. See also *Santa Fe Independent School Dist.* v. *Doe*, 530 U. S. 290 (2000) (holding the school's policy of permitting prayer at

football games unconstitutional where the activity took place during a school-sponsored event and not in a public forum). We did not place independent significance on the fact that the graduation exercise might take place on school premises, *Lee*, *supra*, at 583. Here, where the school facilities are being used for a nonschool function and there is no government sponsorship of the Club's activities, *Lee* is inapposite.

Equally unsupportive is *Edwards* v. *Aguillard*, 482 U. S. 578 (1987), in which we held that a Louisiana law that proscribed the teaching of evolution as part of the public school curriculum, unless accompanied by a lesson on creationism, violated the Establishment Clause. In *Edwards*, we mentioned that students are susceptible to pressure in the classroom, particularly given their possible reliance on teachers as role models. See *id.*, at 584. But we did not discuss this concern in our application of the law to the facts. Moreover, we did note that mandatory attendance requirements meant that state advancement of religion in a school would be particularly harshly felt by impressionable students.[6] But we did not suggest that, when the school was not actually advancing religion, the impressionability of students would be relevant to the Establishment Clause issue. Even if *Edwards* had articulated the principle Milford believes it did, the facts in *Edwards* are simply too remote from those here

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[6] Milford also cites *Illinois ex rel. McCollum* v. *Board of Ed. of School Dist. No. 71, Champaign Cty.*, 333 U. S. 203 (1948), for its position that the Club's religious element would be advanced by the State through compulsory attendance laws. In *McCollum*, the school district excused students from their normal classroom study during the regular schoolday to attend classes taught by sectarian religious teachers, who were subject to approval by the school superintendent. Under these circumstances, this Court found it relevant that "[t]he operation of the State's compulsory education system . . . assist[ed] and [wa]s integrated with the program of religious instruction carried on by separate religious sects." *Id.*, at 209. In the present case, there is simply no integration and cooperation between the school district and the Club. The Club's activities take place *after* the time when the children are compelled by state law to be at the school.

to give the principle any weight. *Edwards* involved the content of the curriculum taught by state teachers *during the schoolday* to children required to attend. Obviously, when individuals who are not schoolteachers are giving lessons after school to children permitted to attend only with parental consent, the concerns expressed in *Edwards* are not present.[7]

Fourth, even if we were to consider the possible misperceptions by schoolchildren in deciding whether Milford's permitting the Club's activities would violate the Establishment Clause, the facts of this case simply do not support Milford's conclusion. There is no evidence that young children are permitted to loiter outside classrooms after the schoolday has ended. Surely even young children are aware of events for which their parents must sign permission

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[7] Milford also refers to *Board of Ed. of Westside Community Schools (Dist. 66)* v. *Mergens*, 496 U. S. 226 (1990), to support its view that "assumptions about the ability of students to make . . . subtle distinctions [between schoolteachers during the schoolday and Reverend Fournier after school] are less valid for elementary age children who tend to be less informed, more impressionable, and more subject to peer pressure than average adults." Brief for Respondent 19. Four Justices in *Mergens* believed that high school students likely are capable of distinguishing between government and private endorsement of religion. See 496 U. S., at 250–251 (opinion of O'CONNOR, J.). The opinion, however, made no statement about how capable of discerning endorsement elementary school children would have been in the context of *Mergens*, where the activity at issue was *after school*. In any event, even to the extent elementary school children are more prone to peer pressure than are older children, it simply is not clear what, in this case, they could be pressured to do.

In further support of the argument that the impressionability of elementary school children even after school is significant, Milford points to several cases in which we have found Establishment Clause violations in public schools. For example, Milford relies heavily on *School Dist. of Abington Township* v. *Schempp*, 374 U. S. 203 (1963), in which we found unconstitutional Pennsylvania's practice of permitting public schools to read Bible verses at the opening of each schoolday. *Schempp*, however, is inapposite because this case does not involve activity by the school during the schoolday.

forms. The meetings were held in a combined high school resource room and middle school special education room, not in an elementary school classroom. The instructors are not schoolteachers. And the children in the group are not all the same age as in the normal classroom setting; their ages range from 6 to 12.[8] In sum, these circumstances simply do not support the theory that small children would perceive endorsement here.

Finally, even if we were to inquire into the minds of schoolchildren in this case, we cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum. This concern is particularly acute given the reality that Milford's building is not used only for elementary school children. Students, from kindergarten through the 12th grade, all attend school in the same building. There may be as many, if not more, upperclassmen as elementary school children who occupy the school after hours. For that matter, members of the public writ large are permitted in the school after hours pursuant to the community use policy. Any bystander could conceivably be aware of the school's use policy and its exclusion of the Good News Club, and could suffer as much from viewpoint discrimination as elementary school children could suffer from perceived endorsement. Cf. *Rosenberger*, 515 U. S., at 835–836 (expressing the concern that viewpoint discrimination can chill individual thought and expression).

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[8] Milford also relies on the Equal Access Act, 98 Stat. 1302, 20 U. S. C. §§ 4071–4074, as evidence that Congress has recognized the vulnerability of elementary school children to misperceiving endorsement of religion. The Act, however, makes no express recognition of the impressionability of elementary school children. It applies only to public secondary schools and makes no mention of elementary schools. § 4071(a). We can derive no meaning from the choice by Congress not to address elementary schools.

We cannot operate, as Milford would have us do, under the assumption that any risk that small children would perceive endorsement should counsel in favor of excluding the Club's religious activity. We decline to employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive. Cf. *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U. S. 753, 779–780 (1995) (O'CONNOR, J., concurring in part and concurring in judgment) ("[B]ecause our concern is with the political community writ large, the endorsement inquiry is *not about the perceptions of particular individuals* or saving isolated nonadherents from . . . discomfort . . . . It is for this reason that the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious [speech takes place]" (emphasis added)). There are countervailing constitutional concerns related to rights of other individuals in the community. In this case, those countervailing concerns are the free speech rights of the Club and its members. Cf. *Rosenberger*, *supra*, at 835 ("Vital First Amendment speech principles are at stake here"). And, we have already found that those rights have been violated, not merely perceived to have been violated, by the school's actions toward the Club.

We are not convinced that there is any significance in this case to the possibility that elementary school children may witness the Good News Club's activities on school premises, and therefore we can find no reason to depart from our holdings in *Lamb's Chapel* and *Widmar*. Accordingly, we conclude that permitting the Club to meet on the school's premises would not have violated the Establishment Clause.[9]

[9] Both parties have briefed the Establishment Clause issue extensively, and neither suggests that a remand would be of assistance on this issue. Although JUSTICE SOUTER would prefer that a record be developed on

V

When Milford denied the Good News Club access to the school's limited public forum on the ground that the Club was religious in nature, it discriminated against the Club because of its religious viewpoint in violation of the Free Speech Clause of the First Amendment. Because Milford has not raised a valid Establishment Clause claim, we do not address the question whether such a claim could excuse Milford's viewpoint discrimination.

* * *

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, concurring.

I join the Court's opinion but write separately to explain further my views on two issues.

I

First, I join Part IV of the Court's opinion, regarding the Establishment Clause issue, with the understanding that its consideration of coercive pressure, see *ante*, at 115, and perceptions of endorsement, see *ante*, at 115, 117–118, "to the extent" that the law makes such factors relevant,

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several facts, see *post*, at 140, and JUSTICE BREYER believes that development of those facts could yet be dispositive in this case, see *post*, at 128 (opinion concurring in part), none of these facts is relevant to the Establishment Clause inquiry. For example, JUSTICE SOUTER suggests that we cannot determine whether there would be an Establishment Clause violation unless we know when, and to what extent, other groups use the facilities. When a limited public forum is available for use by groups presenting any viewpoint, however, we would not find an Establishment Clause violation simply because only groups presenting a religious viewpoint have opted to take advantage of the forum at a particular time.

is consistent with the belief (which I hold) that in this case that extent is zero. As to coercive pressure: Physical coercion is not at issue here; and so-called "peer pressure," if it can even be considered coercion, is, when it arises from private activities, one of the attendant consequences of a freedom of association that is constitutionally protected, see, *e. g.*, *Roberts* v. *United States Jaycees*, 468 U. S. 609, 622 (1984); *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 460–461 (1958). What is at play here is not coercion, but the compulsion of ideas—and the private right to exert and receive that compulsion (or to have one's children receive it) is *protected* by the Free Speech and Free Exercise Clauses, see, *e. g.*, *Heffron* v. *International Soc. for Krishna Consciousness, Inc.*, 452 U. S. 640, 647 (1981); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 108–109 (1943); *Cantwell* v. *Connecticut*, 310 U. S. 296, 307–310 (1940), not banned by the Establishment Clause. A priest has as much liberty to proselytize as a patriot.

As to endorsement, I have previously written that "[r]eligious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms." *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U. S. 753, 770 (1995). The same is true of private speech that occurs in a limited public forum, publicly announced, whose boundaries are not drawn to favor religious groups but instead permit a cross-section of uses. In that context, which is this case, "erroneous conclusions [about endorsement] do not count." *Id.*, at 765. See also *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384, 401 (1993) (SCALIA, J., concurring in judgment) ("I would hold, simply and clearly, that giving [a private religious group] nondiscriminatory access to school facilities cannot violate [the Establishment Clause] because it does not signify state or local embrace of a particular religious sect").

II

Second, since we have rejected the only reason that respondent gave for excluding the Club's speech from a forum that clearly included it (the forum was opened to any "us[e] pertaining to the welfare of the community," App. to Pet. for Cert. D1), I do not suppose it matters whether the exclusion is characterized as viewpoint or subject-matter discrimination. Lacking *any* legitimate reason for excluding the Club's speech from its forum—"because it's religious" will not do, see, *e. g., Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 532–533, 546 (1993); *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872, 877–878 (1990)—respondent would seem to fail First Amendment scrutiny regardless of how its action is characterized. Even subject-matter limits must at least be "reasonable in light of the purpose served by the forum," *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 806 (1985).[1] But I agree, in any event, that respondent did discriminate on the basis of viewpoint.

As I understand it, the point of disagreement between the Court and the dissenters (and the Court of Appeals)

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[1] In this regard, I should note the inaccuracy of JUSTICE SOUTER's claim that the reasonableness of the forum limitation is not properly before us, see *post*, at 136, and n. 1 (dissenting opinion). Petitioners argued, both in their papers filed in the District Court, Memorandum of Law in Support of Cross-Motion for Summary Judgment in No. 97–CV–0302 (NDNY), pp. 20–22, and in their brief filed on appeal, Brief for Appellants in No. 98–9494 (CA2), pp. 33–35, that respondent's exclusion of them from the forum was unreasonable in light of the purposes served by the forum. Although the District Court did say in passing that the reasonableness of respondent's general restriction on use of its facilities for religious purposes was not challenged, see 21 F. Supp. 2d 147, 154 (NDNY 1998), the Court of Appeals apparently decided that the particular reasonableness challenge brought by petitioners had been preserved, because it addressed the argument on the merits, see 202 F. 3d 502, 509 (CA2 2000) ("Taking first the reasonableness criterion, the Club argues that the restriction is unreasonable . . . . This argument is foreclosed by precedent").

with regard to petitioner's Free Speech Clause claim is not whether the Good News Club must be permitted to present religious viewpoints on morals and character in respondent's forum, which has been opened to secular discussions of that subject, see *ante*, at 108.[2] The answer to that is established by our decision in *Lamb's Chapel*, *supra*. The point of disagreement is not even whether *some* of the Club's religious speech fell within the protection of *Lamb's Chapel*. It certainly did. See *ante*, at 108; 202 F. 3d 502, 509 (CA2 2000) (the Club's "teachings may involve secular values such as obedience or resisting jealousy").

The disagreement, rather, regards the portions of the Club's meetings that are not "purely" "discussions" of morality and character from a religious viewpoint. The Club, for example, urges children "who already believe in the Lord Jesus as their Savior" to "[s]top and ask God for the strength and the 'want' . . . to obey Him," 21 F. Supp. 2d 147, 156 (NDNY 1998) (internal quotation marks omitted), and it invites children who "don't know Jesus as Savior" to "trust the Lord Jesus to be [their] Savior from sin," *ibid.* The dissenters and the Second Circuit say that the presence of such additional speech, because it is purely religious, transforms the Club's meetings into something different in kind from other, nonreligious activities that teach moral and character development. See *post*, at 132–133 (STEVENS, J., dissenting); *post*, at 137–138 (SOUTER, J., dissenting); 202 F. 3d, at 509–511. Therefore, the argument goes, excluding the Club is not viewpoint discrimination. I disagree.

Respondent has opened its facilities to any "us[e] pertaining to the welfare of the community, provided that such us[e] shall be nonexclusive and shall be opened to the general

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[2] Neither does the disagreement center on the mode of the Club's speech—the fact that it sings songs and plays games. Although a forum could perhaps be opened to lectures but not plays, debates but not concerts, respondent has placed no such restrictions on the use of its facilities. See App. N8, N14, N19 (allowing seminars, concerts, and plays).

public." App. to Pet. for Cert. D1. Shaping the moral and character development of children certainly "pertain[s] to the welfare of the community." Thus, respondent has agreed that groups engaged in the endeavor of developing character may use its forum. The Boy Scouts, for example, may seek "to influence a boy's character, development and spiritual growth," App. N10–N11; cf. *Boy Scouts of America* v. *Dale*, 530 U. S. 640, 649 (2000) ("[T]he general mission of the Boy Scouts is clear: '[t]o instill values in young people' " (quoting the Scouts' mission statement)), and a group may use Aesop's Fables to teach moral values, App. N11. When the Club attempted to teach Biblical-based moral values, however, it was excluded because its activities "d[id] not involve merely a religious perspective on the secular subject of morality" and because "it [was] clear from the conduct of the meetings that the Good News Club goes far beyond merely stating its viewpoint." 202 F. 3d, at 510.

From no other group does respondent require the sterility of speech that it demands of petitioners. The Boy Scouts could undoubtedly buttress their exhortations to keep "morally straight" and live "clean" lives, see *Boy Scouts of America* v. *Dale*, *supra*, at 649, by giving *reasons* why that is a good idea—because parents want and expect it, because it will make the scouts "better" and "more successful" people, because it will emulate such admired past Scouts as former President Gerald Ford. The Club, however, may only discuss morals and character, and cannot give *its* reasons why they should be fostered—because God wants and expects it, because it will make the Club members "saintly" people, and because it emulates Jesus Christ. The Club may not, in other words, independently discuss the religious premise on which its views are based—that God exists and His assistance is necessary to morality. It may not defend the premise, and it absolutely must not seek to persuade the children that the premise is true. The children must, so to say, take it on faith. This is blatant viewpoint dis-

crimination. Just as calls to character based on patriotism will go unanswered if the listeners do not believe their country is good and just, calls to moral behavior based on God's will are useless if the listeners do not believe that God exists. Effectiveness in presenting a viewpoint rests on the persuasiveness with which the speaker defends his premise—and in respondent's facilities every premise but a religious one may be defended.

In *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995), we struck down a similar viewpoint restriction. There, a private student newspaper sought funding from a student-activity fund on the same basis as its secular counterparts. And though the paper printed such directly religious material as exhortations to belief, see *id.*, at 826 (quoting the paper's self-described mission "'to encourage students to consider what a personal relationship with Jesus Christ means'"); *id.*, at 865 (SOUTER, J., dissenting) ("'The only way to salvation through Him is by confessing and repenting of sin. It is the Christian's duty to make sinners aware of their need for salvation'" (quoting the paper)); see also *id.*, at 865–867 (quoting other examples), we held that refusing to provide the funds discriminated on the basis of viewpoint, because the religious speech had been used to "provid[e] . . . a specific premise . . . from which a variety of subjects may be discussed and considered," *id.*, at 831 (opinion of the Court). The right to present a viewpoint based on a religion premise carried with it the right to defend the premise.

The dissenters emphasize that the religious speech used by the Club as the foundation for its views on morals and character is not just any type of religious speech—although they cannot agree exactly what type of religious speech it is. In JUSTICE STEVENS's view, it is speech "aimed principally at proselytizing or inculcating belief in a particular religious faith," *post*, at 130; see also *post*, at 133–134, n. 3. This does not, to begin with, distinguish *Rosenberger*, which

also involved proselytizing speech, as the above quotations show. See also *Rosenberger*, *supra*, at 844 (referring approvingly to the dissent's description of the paper as a "wor[k] characterized by . . . evangelism"). But in addition, it does not distinguish the Club's activities from those of the other groups using respondent's forum—which have not, as JUSTICE STEVENS suggests, see *post*, at 131–132, been restricted to roundtable "discussions" of moral issues. Those groups may seek to inculcate children with their beliefs, and they may furthermore "recruit others to join their respective groups," *post*, at 131. The Club must therefore have liberty to do the same, even if, as JUSTICE STEVENS fears without support in the record, see *ibid.*, its actions may prove (shudder!) divisive. See *Lamb's Chapel*, 508 U. S., at 395 (remarking that worries about "public unrest" caused by "proselytizing" are "difficult to defend as a reason to deny the presentation of a religious point of view"); cf. *Lynch* v. *Donnelly*, 465 U. S. 668, 684–685 (1984) (holding that "political divisiveness" could not invalidate inclusion of crèche in municipal Christmas display); *Cantwell* v. *Connecticut*, 310 U. S., at 310–311.

JUSTICE SOUTER, while agreeing that the Club's religious speech "may be characterized as proselytizing," *post*, at 139, n. 3, thinks that it is even more clearly excludable from respondent's forum because it is essentially "an evangelical service of worship," *post*, at 138. But we have previously rejected the attempt to distinguish worship from other religious speech, saying that "the distinction has [no] intelligible content," and further, no *"relevance"* to the constitutional issue. *Widmar* v. *Vincent*, 454 U. S. 263, 269, n. 6 (1981); see also *Murdock* v. *Pennsylvania*, 319 U. S., at 109 (refusing to distinguish evangelism from worship).[3] Those holdings

[3] We *have* drawn a different distinction—between religious speech generally and speech about religion—but only with regard to restrictions the State must place on its own speech, where pervasive state monitoring is unproblematic. See *School Dist. of Abington Township* v. *Schempp*,

are surely proved correct today by the dissenters' inability to agree, even between themselves, into which subcategory of religious speech the Club's activities fell. If the distinction did have content, it would be beyond the courts' competence to administer. *Widmar* v. *Vincent*, *supra*, at 269, n. 6; cf. *Lee* v. *Weisman*, 505 U. S. 577, 616–617 (1992) (SOUTER, J., concurring) ("I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible," than "comparative theology"). And if courts (and other government officials) were competent, applying the distinction would require state monitoring of private, religious speech with a degree of pervasiveness that we have previously found unacceptable. See, *e. g.*, *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, *supra*, at 844–845; *Widmar* v. *Vincent*, *supra*, at 269, n. 6. I will not endorse an approach that suffers such a wondrous diversity of flaws.

* * *

With these words of explanation, I join the opinion of the Court.

JUSTICE BREYER, concurring in part.

I agree with the Court's conclusion and join its opinion to the extent that they are consistent with the following three observations. First, the government's "neutrality" in respect to religion is one, but only one, of the considerations relevant to deciding whether a public school's policy violates the Establishment Clause. See, *e. g.*, *Mitchell* v. *Helms*, 530 U. S. 793, 839 (2000) (O'CONNOR, J., concurring in judgment);

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374 U. S. 203, 225 (1963) (State schools in their official capacity may not teach religion but may teach about religion). Whatever the rule there, licensing and monitoring private religious speech is an entirely different matter, see, *e. g.*, *Kunz* v. *New York*, 340 U. S. 290, 293–294 (1951), even in a limited public forum where the State has some authority to draw subject-matter distinctions.

Capitol Square Review and Advisory Bd. v. *Pinette*, 515 U. S. 753, 774, 777 (1995) (O'CONNOR, J., concurring in part and concurring in judgment). As this Court previously has indicated, a child's perception that the school has endorsed a particular religion or religion in general may also prove critically important. See *School Dist. of Grand Rapids* v. *Ball*, 473 U. S. 373, 389–390 (1985); see also *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384, 395 (1993); *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 592–594 (1989). Today's opinion does not purport to change that legal principle.

Second, the critical Establishment Clause question here may well prove to be whether a child, participating in the Good News Club's activities, could reasonably perceive the school's permission for the Club to use its facilities as an endorsement of religion. See *Ball*, *supra*, at 390 ("[A]n important concern of the effects test is whether . . . the challenged government action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices"). The time of day, the age of the children, the nature of the meetings, and other specific circumstances are relevant in helping to determine whether, in fact, the Club "so dominate[s]" the "forum" that, in the children's minds, "a formal policy of equal access is transformed into a demonstration of approval." *Capitol Square Review and Advisory Bd.*, *supra*, at 777 (O'CONNOR, J., concurring in part and concurring in judgment).

Third, the Court cannot fully answer the Establishment Clause question this case raises, given its procedural posture. The specific legal action that brought this case to the Court of Appeals was the District Court's decision to grant Milford Central School's motion for summary judgment. The Court of Appeals affirmed the grant of summary judgment. We now hold that the school was not entitled to

summary judgment, either in respect to the Free Speech or the Establishment Clause issue. Our holding must mean that, *viewing the disputed facts* (including facts about the children's perceptions) *favorably to the Club* (the nonmoving party), the school has not shown an Establishment Clause violation.

To deny one party's motion for summary judgment, however, is not to grant summary judgment for the other side. There may be disputed "genuine issue[s]" of "material fact," Fed. Rule Civ. Proc. 56(c), particularly about how a reasonable child participant would understand the school's role, cf. *post*, at 140 (SOUTER, J., dissenting). Indeed, the Court itself points to facts not in evidence, *ante*, at 117 ("There is no evidence that young children are permitted to loiter outside classrooms after the schoolday has ended"), *ante*, at 118 ("There may be as many, if not more, upperclassmen as elementary school children who occupy the school after hours"), identifies facts in evidence which may, depending on other facts not in evidence, be of legal significance, *ibid.* (discussing the type of room in which the meetings were held and noting that the Club's participants "are not all the same age as in the normal classroom setting"), and makes assumptions about other facts, *ante*, at 117–118 ("Surely even young children are aware of events for which their parents must sign permission forms"), *ante*, at 118 ("Any bystander could conceivably be aware of the school's use policy and its exclusion of the Good News Club, and could suffer as much from viewpoint discrimination as elementary school children could suffer from perceived endorsement"). The Court's invocation of what is missing from the record and its assumptions about what is present in the record only confirm that both parties, if they so desire, should have a fair opportunity to fill the evidentiary gap in light of today's opinion. Cf. Fed. Rules Civ. Proc. 56(c) (summary judgment appropriate only where there is "no genuine issue as to any material fact" and movant "is entitled to a judgment as a

matter of law"), 56(f) (permitting supplementation of record for summary judgment purposes where appropriate).

JUSTICE STEVENS, dissenting.

The Milford Central School has invited the public to use its facilities for educational and recreational purposes, but not for "religious purposes." Speech for "religious purposes" may reasonably be understood to encompass three different categories. First, there is religious speech that is simply speech about a particular topic from a religious point of view. The film in *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384 (1993), illustrates this category. See *id.*, at 388 (observing that the film series at issue in that case "would discuss Dr. [James] Dobson's views on the undermining influences of the media that could only be counterbalanced by returning to traditional, Christian family values instilled at an early stage"). Second, there is religious speech that amounts to worship, or its equivalent. Our decision in *Widmar* v. *Vincent*, 454 U. S. 263 (1981), concerned such speech. See *id.*, at 264–265 (describing the speech in question as involving "religious worship"). Third, there is an intermediate category that is aimed principally at proselytizing or inculcating belief in a particular religious faith.

A public entity may not generally exclude even religious worship from an open public forum. *Id.*, at 276. Similarly, a public entity that creates a limited public forum for the discussion of certain specified topics may not exclude a speaker simply because she approaches those topics from a religious point of view. Thus, in *Lamb's Chapel* we held that a public school that permitted its facilities to be used for the discussion of family issues and child rearing could not deny access to speakers presenting a religious point of view on those issues. See 508 U. S., at 393–394.

But, while a public entity may not censor speech about an authorized topic based on the point of view expressed

by the speaker, it has broad discretion to "preserve the property under its control for the use to which it is lawfully dedicated." *Greer* v. *Spock*, 424 U. S. 828, 836 (1976); see also *Board of Ed. of Westside Community Schools (Dist. 66)* v. *Mergens*, 496 U. S. 226, 275, n. 6 (1990) (STEVENS, J., dissenting) ("A school's extracurricular activities constitute a part of the school's teaching mission, and the school accordingly must make 'decisions concerning the content of those activities'" (quoting *Widmar*, 454 U. S., at 278 (STEVENS, J., concurring in judgment)). Accordingly, "control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 806 (1985). The novel question that this case presents concerns the constitutionality of a public school's attempt to limit the scope of a public forum it has created. More specifically, the question is whether a school can, consistently with the First Amendment, create a limited public forum that admits the first type of religious speech without allowing the other two.

Distinguishing speech from a religious viewpoint, on the one hand, from religious proselytizing, on the other, is comparable to distinguishing meetings to discuss political issues from meetings whose principal purpose is to recruit new members to join a political organization. If a school decides to authorize afterschool discussions of current events in its classrooms, it may not exclude people from expressing their views simply because it dislikes their particular political opinions. But must it therefore allow organized political groups—for example, the Democratic Party, the Libertarian Party, or the Ku Klux Klan—to hold meetings, the principal purpose of which is not to discuss the current-events topic from their own unique point of view but rather to recruit others to join their respective groups? I think not. Such recruiting meetings may introduce divisiveness and

tend to separate young children into cliques that undermine the school's educational mission. Cf. *Lehman* v. *Shaker Heights*, 418 U. S. 298 (1974) (upholding a city's refusal to allow "political advertising" on public transportation).

School officials may reasonably believe that evangelical meetings designed to convert children to a particular religious faith pose the same risk. And, just as a school may allow meetings to discuss current events from a political perspective without also allowing organized political recruitment, so too can a school allow discussion of topics such as moral development from a religious (or nonreligious) perspective without thereby opening its forum to religious proselytizing or worship. See, *e. g.*, *Campbell* v. *St. Tammany Parish School Board*, 231 F. 3d 937, 942 (CA5 2000) ("Under the Supreme Court's jurisprudence, a government entity such as a school board has the opportunity to open its facilities to activity protected by the First Amendment, without inviting political or religious activities presented in a form that would disserve its efforts to maintain neutrality"). Moreover, any doubt on a question such as this should be resolved in a way that minimizes "intrusion by the Federal Government into the operation of our public schools," *Mergens*, 496 U. S., at 290 (STEVENS, J., dissenting); see also *Epperson* v. *Arkansas*, 393 U. S. 97, 104 (1968) ("Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities").

The particular limitation of the forum at issue in this case is one that prohibits the use of the school's facilities for "religious purposes." It is clear that, by "religious purposes," the school district did not intend to exclude all speech from a religious point of view. See App. N13–N15 (testimony of the superintendent for Milford schools indicating that the policy would permit people to teach "that man was created by God as described in the Book of Genesis" and that crime

was caused by society's "lack of faith in God"). Instead, it sought only to exclude religious speech whose principal goal is to "promote the gospel." *Id.*, at N18. In other words, the school sought to allow the first type of religious speech while excluding the second and third types. As long as this is done in an evenhanded manner, I see no constitutional violation in such an effort.[1] The line between the various categories of religious speech may be difficult to draw, but I think that the distinctions are valid, and that a school, particularly an elementary school, must be permitted to draw them.[2] Cf. *Illinois ex rel. McCollum* v. *Board of Ed. of School Dist. No. 71, Champaign Cty.*, 333 U. S. 203, 231 (1948) (Frankfurter, J., concurring) ("In no activity of the State is it more vital to keep out divisive forces than in its schools . . .").

This case is undoubtedly close. Nonetheless, regardless of whether the Good News Club's activities amount to "worship," it does seem clear, based on the facts in the record, that the school district correctly classified those activities as falling within the third category of religious speech and therefore beyond the scope of the school's limited public forum.[3] In short, I am persuaded that the school district

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[1] The school district, for example, could not, consistently with its present policy, allow school facilities to be used by a group that affirmatively attempted to inculcate nonbelief in God or in the view that morality is wholly unrelated to belief in God. Nothing in the record, however, indicates that any such group was allowed to use school facilities.

[2] "A perceptive observer sees a material difference between the light of day and the dark of night, and knows that difference to be a reality even though the two are separated not by a bright line but by a zone of twilight." *Buirkle* v. *Hanover Ins. Cos.*, 832 F. Supp. 469, 483 (Mass. 1993).

[3] The majority elides the distinction between religious speech on a particular topic and religious speech that seeks primarily to inculcate belief. Thus, it relies on *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995), as if that case involved precisely the same type of speech that is at issue here. But, while both Wide Awake, the organization in *Rosenberger*, and the Good News Club engage in a mixture

could (and did) permissibly exclude from its limited public forum proselytizing religious speech that does not rise to the level of actual worship. I would therefore affirm the judgment of the Court of Appeals.

Even if I agreed with Part II of the majority opinion, however, I would not reach out, as it does in Part IV, to decide a constitutional question that was not addressed by either the District Court or the Court of Appeals.

Accordingly, I respectfully dissent.

JUSTICE SOUTER, with whom JUSTICE GINSBURG joins, dissenting.

The majority rules on two issues. First, it decides that the Court of Appeals failed to apply the rule in *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384 (1993), which held that the government may not discriminate on the basis of viewpoint in operating a limited public forum. The majority applies that rule and concludes that Milford violated *Lamb's Chapel* in denying Good News the use of the school. The majority then goes on to determine that it would not violate the Establishment Clause of the First Amendment for the Milford School District to allow the Good News Club to hold its intended gatherings of public school children in Milford's elementary school.

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of different types of religious speech, the *Rosenberger* Court clearly believed that the first type of religious speech predominated in Wide Awake. It described that group's publications as follows:

"The first issue had articles about racism, crisis pregnancy, stress, prayer, C. S. Lewis' ideas about evil and free will, and reviews of religious music. In the next two issues, Wide Awake featured stories about homosexuality, Christian missionary work, and eating disorders, as well as music reviews and interviews with University professors." *Id.*, at 826.

In contrast to Wide Awake's emphasis on providing Christian commentary on such a diverse array of topics, Good News Club meetings are dominated by religious exhortation, see *post*, at 137–138 (SOUTER, J., dissenting). My position is therefore consistent with the Court's decision in *Rosenberger*.

The majority is mistaken on both points. The Court of Appeals unmistakably distinguished this case from *Lamb's Chapel*, though not by name, and accordingly affirmed the application of a policy, unchallenged in the District Court, that Milford's public schools may not be used for religious purposes. As for the applicability of the Establishment Clause to the Good News Club's intended use of Milford's school, the majority commits error even in reaching the issue, which was addressed neither by the Court of Appeals nor by the District Court. I respectfully dissent.

I

Lamb's Chapel, a case that arose (as this one does) from application of N. Y. Educ. Law §414 (McKinney 2000) and local policy implementing it, built on the accepted rule that a government body may designate a public forum subject to a reasonable limitation on the scope of permitted subject matter and activity, so long as the government does not use the forum-defining restrictions to deny expression to a particular viewpoint on subjects open to discussion. Specifically, *Lamb's Chapel* held that the government could not "permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint." 508 U. S., at 393–394.

This case, like *Lamb's Chapel*, properly raises no issue about the reasonableness of Milford's criteria for restricting the scope of its designated public forum. Milford has opened school property for, among other things, "instruction in any branch of education, learning or the arts" and for "social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be opened to the general public." App. to Pet. for Cert. D1–D3. But Milford has done this subject to the restriction that "[s]chool premises shall not be used . . . for

religious purposes." *Id.*, at D2. As the District Court stated, Good News did "not object to the reasonableness of [Milford]'s policy that prohibits the use of [its] facilities for religious purposes." *Id.*, at C14.

The sole question before the District Court was, therefore, whether, in refusing to allow Good News's intended use, Milford was misapplying its unchallenged restriction in a way that amounted to imposing a viewpoint-based restriction on what could be said or done by a group entitled to use the forum for an educational, civic, or other permitted purpose. The question was whether Good News was being disqualified when it merely sought to use the school property the same way that the Milford Boy and Girl Scouts and the 4–H Club did. The District Court held on the basis of undisputed facts that Good News's activity was essentially unlike the presentation of views on secular issues from a religious standpoint held to be protected in *Lamb's Chapel*, see App. to Pet. for Cert. C29–C31, and was instead activity precluded by Milford's unchallenged policy against religious use, even under the narrowest definition of that term.

The Court of Appeals understood the issue the same way. See 202 F. 3d 502, 508 (CA2 2000) (Good News argues that "to exclude the Club because it teaches morals and values from a Christian perspective constitutes unconstitutional viewpoint discrimination"); *id.*, at 509 ("The crux of the Good News Club's argument is that the Milford school's application of the Community Use Policy to exclude the Club from its facilities is not viewpoint neutral").[1] The Court of Appeals

[1] The Court of Appeals held that any challenge to the policy's reasonableness was foreclosed by its own precedent, 202 F. 3d, at 509, a holding the majority leaves untouched, see *ante*, at 107 ("[W]e need not decide whether it is unreasonable in light of the purposes served by the forum"); cf. *ante*, at 108, n. 2 ("Because we hold that the exclusion of the Club on the basis of its religious perspective constitutes unconstitutional viewpoint discrimination, it is no defense for Milford that purely religious purposes can be excluded under state law"). In any event, the reasonableness of the forum limitation was beyond the scope of the appeal from summary

also realized that the *Lamb's Chapel* criterion was the appropriate measure: "The activities of the Good News Club do not involve merely a religious perspective on the secular subject of morality." 202 F. 3d, at 510. Cf. *Lamb's Chapel*, *supra*, at 393 (district could not exclude "religious standpoint" in discussion on child rearing and family values, an undisputed "use for social or civic purposes otherwise permitted" under the use policy).[2] The appeals court agreed with the District Court that the undisputed facts in this case differ from those in *Lamb's Chapel*, as night from day. A sampling of those facts shows why both courts were correct.

Good News's classes open and close with prayer. In a sample lesson considered by the District Court, children are instructed that "[t]he Bible tells us how we can have our sins forgiven by receiving the Lord Jesus Christ. It tells us how to live to please Him. . . . If you have received the Lord Jesus as your Saviour from sin, you belong to God's special group—His family." App. to Pet. for Cert. C17–C18 (ellipsis in original). The lesson plan instructs the teacher to "lead a child to Christ," and, when reading a Bible verse, to "[e]mphasize that this verse is from the Bible, God's Word," and is "important—and true—because God said it." The lesson further exhorts the teacher to "[b]e sure to give an opportunity for the 'unsaved' children in your class to respond to the Gospel" and cautions against "neglect[ing] this responsibility." *Id.*, at C20.

While Good News's program utilizes songs and games, the heart of the meeting is the "challenge" and "invitation," which are repeated at various times throughout the lesson.

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judgment since the District Court had said explicitly that the religious use limitation was not challenged.

[2] It is true, as the majority notes, *ante*, at 109, n. 3, that the Court of Appeals did not cite *Lamb's Chapel* by name. But it followed it in substance, and it did cite an earlier opinion written by the author of the panel opinion here, *Bronx Household of Faith* v. *Community School Dist. No. 10*, 127 F. 3d 207 (CA2 1997), which discussed *Lamb's Chapel* at length.

During the challenge, "saved" children who "already believe in the Lord Jesus as their Savior" are challenged to "'stop and ask God for the strength and the "want" . . . to obey Him.'" *Ibid.* They are instructed that

> "[i]f you know Jesus as your Savior, you need to place God first in your life. And if you don't know Jesus as Savior and if you would like to, then we will—we will pray with you separately, individually. . . . And the challenge would be, those of you who know Jesus as Savior, you can rely on God's strength to obey Him." *Ibid.*

During the invitation, the teacher "invites" the "unsaved" children "'to trust the Lord Jesus to be your Savior from sin,'" and "'receiv[e] [him] as your Savior from sin.'" *Id.*, at C21. The children are then instructed that

> "[i]f you believe what God's Word says about your sin and how Jesus died and rose again for you, you can have His forever life today. Please bow your heads and close your eyes. If you have never believed on the Lord Jesus as your Savior and would like to do that, please show me by raising your hand. If you raised your hand to show me you want to believe on the Lord Jesus, please meet me so I can show you from God's Word how you can receive His everlasting life." *Ibid.*

It is beyond question that Good News intends to use the public school premises not for the mere discussion of a subject from a particular, Christian point of view, but for an evangelical service of worship calling children to commit themselves in an act of Christian conversion.[3] The majority

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[3] The majority rejects Milford's contention that Good News's activities fall outside the purview of the limited forum because they constitute "religious worship" on the ground that the Court of Appeals made no such determination regarding the character of the club's program, see *ante*, at 112, n. 4. This distinction is merely semantic, in light of the Court

avoids this reality only by resorting to the bland and general characterization of Good News's activity as "teaching of morals and character, from a religious standpoint." *Ante*, at 109. If the majority's statement ignores reality, as it surely does, then today's holding may be understood only in equally generic terms. Otherwise, indeed, this case would stand for the remarkable proposition that any public school opened for civic meetings must be opened for use as a church, synagogue, or mosque.

II

I also respectfully dissent from the majority's refusal to remand on all other issues, insisting instead on acting as a court of first instance in reviewing Milford's claim that it would violate the Establishment Clause to grant Good News's application. Milford raised this claim to demonstrate a compelling interest for saying no to Good News, even on the erroneous assumption that *Lamb's Chapel*'s public forum analysis would otherwise require Milford to say yes. Whereas the District Court and Court of Appeals resolved this case entirely on the ground that Milford's actions did not offend the First Amendment's Speech Clause, the majority now sees fit to rule on the application of the Establishment Clause, in derogation of this Court's proper role as a court of review. *E. g., National Collegiate Athletic*

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of Appeals's conclusion that "[i]t is difficult to see how the Club's activities differ materially from the 'religious worship' described" in other case law, 202 F. 3d 502, 510 (CA2 2000), and the record below.

JUSTICE STEVENS distinguishes between proselytizing and worship, *ante*, at 130 (dissenting opinion), and distinguishes each from discussion reflecting a religious point of view. I agree with JUSTICE STEVENS that Good News's activities may be characterized as proselytizing and therefore as outside the purpose of Milford's limited forum, *ante*, at 133. Like the Court of Appeals, I also believe Good News's meetings have elements of worship that put the club's activities further afield of Milford's limited forum policy, the legitimacy of which was unchallenged in the summary judgment proceeding.

Assn. v. *Smith*, 525 U. S. 459, 470 (1999) ("[W]e do not decide in the first instance issues not decided below").

The Court's usual insistence on resisting temptations to convert itself into a trial court and on remaining a court of review is not any mere procedural nicety, and my objection to turning us into a district court here does not hinge on a preference for immutable procedural rules. Respect for our role as a reviewing court rests, rather, on recognizing that this Court can often learn a good deal from considering how a district court and a court of appeals have worked their way through a difficult issue. It rests on recognizing that an issue as first conceived may come to be seen differently as a case moves through trial and appeal; we are most likely to contribute something of value if we act with the benefit of whatever refinement may come in the course of litigation. And our customary refusal to become a trial court reflects the simple fact that this Court cannot develop a record as well as a trial court can. If I were a trial judge, for example, I would balk at deciding on summary judgment whether an Establishment Clause violation would occur here without having statements of undisputed facts or uncontradicted affidavits showing, for example, whether Good News conducts its instruction at the same time as school-sponsored extracurricular and athletic activities conducted by school staff and volunteers, see Brief for Respondent 6; whether any other community groups use school facilities immediately after classes end and how many students participate in those groups; and the extent to which Good News, with 28 students in its membership, may "dominate the forum" in a way that heightens the perception of official endorsement, *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 851 (1995) (O'CONNOR, J., concurring); see also *Widmar* v. *Vincent*, 454 U. S. 263, 274 (1981). We will never know these facts.

Of course, I am in no better position than the majority to perform an Establishment Clause analysis in the first

instance. Like the majority, I lack the benefit that development in the District Court and Court of Appeals might provide, and like the majority I cannot say for sure how complete the record may be. I can, however, speak to the doubtful underpinnings of the majority's conclusion.

This Court has accepted the independent obligation to obey the Establishment Clause as sufficiently compelling to satisfy strict scrutiny under the First Amendment. See *id.*, at 271 ("[T]he interest of the [government] in complying with its constitutional obligations may be characterized as compelling"); *Lamb's Chapel*, 508 U. S., at 394. Milford's actions would offend the Establishment Clause if they carried the message of endorsing religion under the circumstances, as viewed by a reasonable observer. See *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U. S. 753, 777 (1995) (O'CONNOR, J., concurring). The majority concludes that such an endorsement effect is out of the question in Milford's case, because the context here is "materially indistinguishable" from the facts in *Lamb's Chapel* and *Widmar*. *Ante*, at 113. In fact, the majority is in no position to say that, for the principal grounds on which we based our Establishment Clause holdings in those cases are clearly absent here.

In *Widmar*, we held that the Establishment Clause did not bar a religious student group from using a public university's meeting space for worship as well as discussion. As for the reasonable observers who might perceive government endorsement of religion, we pointed out that the forum was used by university students, who "are, of course, young adults," and, as such, "are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion." 454 U. S., at 274, n. 14. To the same effect, we remarked that the "large number of groups meeting on campus" negated "any reasonable inference of University support from the mere fact of a campus meeting place." *Ibid.* Not only was the forum "available to a broad class of nonreligious as

well as religious speakers," but there were, in fact, over 100 recognized student groups at the University, and an "absence of empirical evidence that religious groups [would] dominate [the University's] open forum." *Id.*, at 274–275; see also *id.*, at 274 ("The provision of benefits to so broad a spectrum of groups is an important index of secular effect"). And if all that had not been enough to show that the university-student use would probably create no impression of religious endorsement, we pointed out that the university in that case had issued a student handbook with the explicit disclaimer that "the University's name will not 'be identified in any way with the aims, policies, programs, products, or opinions of any organization or its members.'" *Id.*, at 274, n. 14.

Lamb's Chapel involved an evening film series on child rearing open to the general public (and, given the subject matter, directed at an adult audience). See 508 U. S., at 387, 395. There, school property "had repeatedly been used by a wide variety of private organizations," and we could say with some assurance that "[u]nder these circumstances . . . there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed . . . ." *Id.*, at 395.

What we know about this case looks very little like *Widmar* or *Lamb's Chapel.* The cohort addressed by Good News is not university students with relative maturity, or even high school pupils, but elementary school children as young as six.[4] The Establishment Clause cases have

[4] It is certainly correct that parents are required to give permission for their children to attend Good News's classes, see *ante*, at 115 (as parents are often required to do for a host of official school extracurricular activities), and correct that those parents would likely not be confused as to the sponsorship of Good News's classes. But the proper focus of concern in assessing effects includes the elementary school pupils who are invited to meetings, Lodging, Exh. X2, who see peers heading into classrooms for religious instruction as other classes end, and who are addressed by the "challenge" and "invitation."

The fact that there may be no evidence in the record that individual students were confused during the time the Good News Club met on school

consistently recognized the particular impressionability of schoolchildren, see *Edwards* v. *Aguillard*, 482 U. S. 578, 583–584 (1987), and the special protection required for those in the elementary grades in the school forum, see *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 620, n. 69 (1989). We have held the difference between college students and grade school pupils to be a "distinction [that] warrants a difference in constitutional results," *Edwards* v. *Aguillard*, *supra*, at 584, n. 5 (internal quotation marks and citation omitted).

Nor is Milford's limited forum anything like the sites for wide-ranging intellectual exchange that were home to the challenged activities in *Widmar* and *Lamb's Chapel*. See also *Rosenberger*, 515 U. S., at 850, 836–837. In *Widmar*, the nature of the university campus and the sheer number of activities offered precluded the reasonable college observer from seeing government endorsement in any one of them, and so did the time and variety of community use in the *Lamb's Chapel* case. See also *Rosenberger*, 515 U. S., at 850 ("Given this wide array of nonreligious, antireligious and competing religious viewpoints in the forum supported by the University, any perception that the University endorses one particular viewpoint would be illogical"); *id.*, at 836–837, 850 (emphasizing the array of university-funded magazines containing "widely divergent viewpoints" and the fact that believers in Christian evangelism competed on equal footing in the University forum with aficionados of "Plato, Spinoza, and Descartes," as well as "Karl Marx, Bertrand Russell, and Jean-Paul Sartre"); *Board of Ed. of Westside Community Schools (Dist. 66)* v. *Mergens*, 496

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premises pursuant to the District Court's preliminary injunction is immaterial, cf. Brief for Petitioners 38. As JUSTICE O'CONNOR explained in *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U. S. 753 (1995), the endorsement test does not focus "on the actual perception of individual observers, who naturally have differing degrees of knowledge," but on "the perspective of a hypothetical observer." *Id.*, at 779–780 (opinion concurring in part and concurring in judgment).

U. S. 226, 252 (1990) (plurality opinion) ("To the extent that a religious club is merely one of many different student-initiated voluntary clubs, students should perceive no message of government endorsement of religion").

The timing and format of Good News's gatherings, on the other hand, may well affirmatively suggest the *imprimatur* of officialdom in the minds of the young children. The club is open solely to elementary students (not the entire community, as in *Lamb's Chapel*), only four outside groups have been identified as meeting in the school, and Good News is, seemingly, the only one whose instruction follows immediately on the conclusion of the official schoolday. See Brief for National School Boards Association et al. as *Amici Curiae* 6. Although school is out at 2:56 p.m., Good News apparently requested use of the school beginning at 2:30 on Tuesdays "during the school year," so that instruction could begin promptly at 3:00, see Lodging, Exh. W–1, at which time children who are compelled by law to attend school surely remain in the building. Good News's religious meeting follows regular school activities so closely that the Good News instructor must wait to begin until "the room is clear," and "people are out of the room," App. P29, before starting proceedings in the classroom located next to the regular third- and fourth-grade rooms, *id.*, at N12. In fact, the temporal and physical continuity of Good News's meetings with the regular school routine seems to be the whole point of using the school. When meetings were held in a community church, 8 or 10 children attended; after the school became the site, the number went up three-fold. *Id.*, at P12; Lodging, Exh. AA2.

Even on the summary judgment record, then, a record lacking whatever supplementation the trial process might have led to, and devoid of such insight as the trial and appellate judges might have contributed in addressing the Establishment Clause, we can say this: there is a good case that Good News's exercises blur the line between public

classroom instruction and private religious indoctrination, leaving a reasonable elementary school pupil unable to appreciate that the former instruction is the business of the school while the latter evangelism is not. Thus, the facts we know (or think we know) point away from the majority's conclusion, and while the consolation may be that nothing really gets resolved when the judicial process is so truncated, that is not much to recommend today's result.

Syllabus

ALABAMA *v.* BOZEMAN

CERTIORARI TO THE SUPREME COURT OF ALABAMA

No. 00–492. Argued April 17, 2001—Decided June 11, 2001

The Interstate Agreement on Detainers (Agreement) creates uniform procedures for lodging and executing a detainer, *i. e.*, a legal order that requires a State to hold a currently imprisoned individual when he has finished serving his sentence so that he may be tried by a different State for a different crime. As relevant here, the Agreement provides that a State that obtains a prisoner for purposes of trial must try him within 120 days of his arrival, Art. IV(c), and if it returns him to his "original place of imprisonment" prior to that trial, charges "shall" be dismissed with prejudice, Art. IV(e). While respondent Bozeman was serving a federal prison sentence in Florida, the Covington County, Alabama, district attorney sought temporary custody of Bozeman to arraign him on firearms charges and to appoint counsel. When taken to Covington County, Bozeman spent the night in the county jail, appeared in local court the next morning, obtained local counsel, and was returned to federal prison that evening. About one month later, he was brought back to the county for trial. Bozeman's counsel moved to dismiss the state charges on the ground that, because Bozeman had been "returned to the original place of imprisonment" (namely, the federal prison) "prior to" "trial" on state charges being "had," in violation of Article IV(e), the local court had to dismiss the charges with prejudice in light of Art. IV(e)'s command as to remedy. Bozeman was convicted, and an appeals court affirmed. The State Supreme Court reversed, holding that the Agreement's literal language controlled and required dismissal of the state charges.

Held: The literal language of Article IV(e) bars any further criminal proceedings when a defendant is returned to the original place of imprisonment before trial. Pp. 152–157.

(a) Alabama claims that Article IV(e)'s basic purpose is to prevent shuttling that would interrupt a prisoner's rehabilitation and that, since the one-day interruption here did not interrupt rehabilitation significantly, any violation is "technical," "harmless," or "*de minimis.*" However, the Agreement's language militates against an implicit exception, for it is absolute, as the word "shall" is ordinarily the language of command. *Anderson* v. *Yungkau*, 329 U. S. 482, 485. Moreover, the Agreement makes no distinction among different kinds of arrivals, *e. g.*, exempting those that are followed by return within a short, speci-

fied time period, or those that are simply for arraignment purposes. Pp. 152–154.

(b) Even assuming that the Agreement exempts violations that, viewed in terms of its purposes, are *de minimis*, the violation here could not qualify as trivial, because the "no return" provision's purpose cannot be a simple, direct effort to prevent the interruption of rehabilitation. Article IV(e)'s requirement that the prisoner remain in the county jail means that he will typically spend 120 days away from the sending State's rehabilitation programs, whereas returning him prior to trial—in violation of IV(e)—would permit him to participate in the sending State's program for some of those days. To call such a violation "technical," because it means fewer days spent away from the sending State, is to call virtually *every* conceivable antishuttling violation "technical." The Agreement may seek to remove rehabilitation obstructions in a different way: Requiring the receiving State to pay for the prisoner's incarceration during the pretrial period (pursuant to Article V) may give the State an incentive to shorten that period and dispose of detainers expeditiously. Alternatively, the Agreement's drafters may have sought to minimize the number of shuttles in the belief that the "shuttling" itself adds to the uncertainties obstructing rehabilitation programs, see Art. I. Regardless of the antishuttling remedy's original purpose, given the Agreement's absolute language, it is enough to explain why Alabama's view is not plausible and to point to other purposes more easily squared with Article IV(e)'s text and operation. Pp. 154–156.

(c) Alabama's additional claim that return to the sending State after a brief journey to the receiving State for pretrial purposes is helpful, not harmful, to the prisoner is a policy argument more appropriately addressed to legislatures. And the federal statutory provision to which the Solicitor General points governs only when the United States is a receiving State, which does not help Alabama's cause. Although this Court rejects Alabama's interpretation of the Agreement, a receiving State is not barred from returning a prisoner when it would be mutually advantageous and the prisoner accordingly waives his Article IV(e) rights. Pp. 156–157.

781 So. 2d 165, affirmed.

BREYER, J., delivered the opinion of the Court, Parts I, II–A, and II–C of which were unanimous, and Part II–B of which was joined by REHNQUIST, C. J., and STEVENS, O'CONNOR, KENNEDY, SOUTER, and GINSBURG, JJ.

Sandra Jean Stewart, Assistant Attorney General of Alabama, argued the cause for petitioner. With her on the briefs was *Bill Pryor*, Attorney General.

Jeffrey A. Lamken argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Acting Solicitor General Underwood*, *Acting Assistant Attorney General Keeney*, and *Deputy Solicitor General Dreeben*.

Mark John Christensen, by appointment of the Court, 531 U. S. 1141, argued the cause and filed a brief for respondent.*

JUSTICE BREYER delivered the opinion of the Court.†

Forty-eight States, the Federal Government, and the District of Columbia (all of which, for simplicity, we shall call "States") have entered into the Interstate Agreement on Detainers (Agreement), 18 U. S. C. App. § 2, p. 692, an interstate compact. The Agreement creates uniform procedures for lodging and executing a detainer, *i. e.*, a legal order that requires a State in which an individual is currently imprisoned to hold that individual when he has finished serving his sentence so that he may be tried by a different State for a different crime.

The Agreement provides for expeditious delivery of the prisoner to the receiving State for trial prior to the termination of his sentence in the sending State. And it seeks to minimize the consequent interruption of the prisoner's ongoing prison term. In particular, Article IV(c) specifies that the receiving State shall begin the prisoner's "trial . . . within one hundred and twenty days of the arrival of the prisoner in the receiving State." At the same time, Article IV(e) prohibits return of the individual to the sending State before that trial is complete. It says:

**Mary E. Hunley* and *Alexander Taylor* filed a brief for the National Association of Extradition Officials as *amicus curiae* urging reversal.

†JUSTICE SCALIA and JUSTICE THOMAS join all but Part II–B of this opinion.

> "If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint *shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.*" (Emphasis added.)

The case before us requires us to interpret the Article IV language that we have just quoted. See *New York* v. *Hill*, 528 U. S. 110, 111 (2000) ("As 'a congressionally sanctioned interstate compact' within the Compact Clause of the United States Constitution, Art. I, § 10, cl. 3, the [Interstate Agreement on Detainers] is a federal law subject to federal construction") (quoting *Carchman* v. *Nash*, 473 U. S. 716, 719 (1985); *Cuyler* v. *Adams*, 449 U. S. 433, 442 (1981)). The case concerns a defendant whose initial imprisonment was interrupted briefly—for a single day—during which time he was brought to the receiving State for purposes of arraignment and then returned immediately to his original place of imprisonment. The question is whether, in such circumstances, the literal language of Article IV(e) bars any further criminal proceedings—because the defendant was "returned to the original place of imprisonment" before "trial" was "had." We conclude that Article IV(e) does bar further proceedings, despite the fact that the interruption of the initial imprisonment lasted for only one day.

I

A

The Council of State Governments drafted the language of the Agreement in 1956. See *United States* v. *Mauro*, 436 U. S. 340, 349–350 (1978). The United States joined in 1970. *Id.*, at 343. And Alabama is one of the 49 other current members. *Hill*, *supra*, at 111; Ala. Code § 15–9–81 (1995). The Agreement contains nine articles. Article I sets forth

the problems that led to the Agreement's creation, namely, that

> "charges outstanding against a prisoner, detainers based on untried indictments, informations, or complaints and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation."

Article I then adds that "it is the . . . purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of . . . detainers . . . ."

Article II sets forth definitions. Article III gives a prisoner against whom a detainer has been lodged the right to "request" a "final disposition" of the relevant charges, in which case "he shall be brought to trial within one hundred and eighty days" (unless extended by the trial court for "good cause"); otherwise, the relevant "indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice." Art. III(a), (d).

Article IV gives "the jurisdiction in which an untried indictment, information, or complaint is pending," *i. e.*, the receiving State, the right "to have a prisoner against whom" it "has lodged a detainer . . . made available" for trial. Art. IV(a). It says further that, once the prisoner arrives in the receiving State, the "trial" must begin "within one hundred and twenty days" unless extended for "good cause." Art. IV(c). Article IV also sets forth the "antishuttling" provision at issue here. To repeat: that provision says that trial must be "had . . . prior to the prisoner's being returned to the original place of imprisonment"; otherwise, the charges "shall" be dismissed with prejudice. Art. IV(e). Article V sets forth conditions on the receiving State obtaining temporary custody of the prisoner. The remaining arti-

cles deal with subsidiary matters, not relevant here with one exception: Article IX provides that the "agreement shall be liberally construed so as to effectuate its purposes."

For present purposes, it is important to keep in mind that the Agreement basically (1) gives a prisoner the right to demand a trial within 180 days; and (2) gives a State the right to obtain a prisoner for purposes of trial, in which case the State (a) must try the prisoner within 120 days of his arrival, and (b) must not return the prisoner to his "original place of imprisonment" prior to that trial.

B

In January 1997, respondent Michael Bozeman was serving a sentence of imprisonment for a federal drug crime in federal prison in Marianna, Florida. At the beginning of that month, the district attorney of Covington County, Alabama, who had earlier lodged a detainer against Bozeman in connection with charges related to discharging firearms, sought temporary custody in order to arraign Bozeman on those firearms charges and secure the appointment of counsel. On January 23, federal authorities released Bozeman to local officials. Those officials took him to Covington County, about 80 miles from the federal prison, where he arrived later in the day. Bozeman spent the night in the county jail, appeared in local court the next morning, obtained local appointed counsel, and was transported back to federal prison that evening. About one month later, Bozeman was brought back to Covington County for trial.

At that time, Bozeman's local counsel filed a motion to dismiss the state charges on the ground that in January Bozeman had been "returned to the original place of imprisonment" (namely, the federal prison) "prior to" "trial" on state charges being "had." See App. 37–42. Consequently, he argued, under Article IV(e) the state charges were without "any further force or effect," and the local court had to "enter an order dismissing the same with prejudice."

Bozeman was convicted, and the trial court subsequently denied Bozeman's motion for dismissal. It wrote that it "made much sense to bring" Bozeman "into the county briefly" to deal with "short pre-trial matters" and then to "return him to the surroundings to which he was accustomed." App. to Pet. for Cert. 28a. Doing so furthered Bozeman's "interest in maintaining . . . rehabilitation available to him in federal prison." *Ibid.* In the trial judge's view, Bozeman "certainly would not [have] receive[d] much rehabilitation in a county jail." *Ibid.* Consequently, the judge concluded, the January transfer was "wholly consistent with" the Agreement's goal, "to expedite the prosecution of state charges without interfering with any rehabilitative programs of the federal government." *Id.*, at 29a.

An intermediate State Court of Appeals affirmed the conviction. 738 So. 2d 934 (1998). But the Alabama State Supreme Court reversed by a 5-to-3 vote. 781 So. 2d 165 (2000). In its view, the literal language of the Agreement controlled and required dismissal of the state charges. The dissenters argued that the Agreement violation was merely "technical," and consequently did not require dismissal. *Id.*, at 170. The State petitioned for certiorari. In light of differences among the lower courts, we granted the writ. Compare, *e. g.*, *United States* v. *Schrum*, 638 F. 2d 214, 215 (CA10 1981) *(per curiam)* (adopting District Court's literal interpretation of Agreement), with *United States* v. *Daniels*, 3 F. 3d 25, 27–28 (CA1 1993) (rejecting literal interpretation of Agreement). And we now affirm the Alabama Supreme Court's decision.

II

Alabama does not deny a violation of Article IV(e) as *literally* interpreted, for it concedes that its officials "returned" Bozeman to his "original place of imprisonment," before Bozeman's county court "trial" was "had." Nor does Alabama claim that Bozeman waived the right to trial before return that Article IV provides. See Reply Brief for Peti-

tioner 1, n. 1. Cf. *Hill*, 528 U. S., at 114–115 (holding that defendant may waive his rights under Art. III of the Agreement). Rather, Alabama, supported by the United States Solicitor General and others, claims that Article IV(e)'s basic purpose is to prevent shuttling that would interrupt the prisoner's rehabilitation. See, *e. g.*, *United States* v. *Roy*, 830 F. 2d 628, 636 (CA7 1987) (provision is "meant to protect the prisoner against endless interruption of the rehabilitation programs because of criminal proceedings in other jurisdictions"). They say the one-day interruption that occurred here did not interrupt rehabilitation significantly. Hence, any violation is "technical," "harmless," or "*de minimis.*" And Article IV(e) contains an implicit exception for such trivial violations. Brief for Petitioner 26; Brief for United States as *Amicus Curiae* 12–13. Cf. *Wisconsin Dept. of Revenue* v. *William Wrigley, Jr., Co.*, 505 U. S. 214, 231 (1992) (laws ordinarily are enacted with understanding that *de minimis* exceptions will be recognized). We cannot accept this argument, however, for two reasons.

A

First, the language of the Agreement militates against an implicit exception, for it is absolute. It says that, when a prisoner is "returned" before trial, the indictment, information, or complaint "*shall not* be of any further force or effect, and the court *shall* enter an order dismissing the same with prejudice." Art. IV(e) (emphasis added). "The word 'shall' is ordinarily 'the language of command.'" *Anderson* v. *Yungkau*, 329 U. S. 482, 485 (1947) (quoting *Escoe* v. *Zerbst*, 295 U. S. 490, 493 (1935)).

The cases Alabama cites as supporting a "harmless error" construction involved statutes that lacked this absolute language. See, *e. g.*, *United States* v. *Montalvo-Murillo*, 495 U. S. 711, 716–717 (1990) (Bail Reform Act "is silent on the issue of a remedy for violations of its time limits"). Cf. *William Wrigley, Jr.*, *supra*, at 231–232 (applying "*de*

minimis exception" presumption as "part of the established background of legal principles against which all enactments are adopted," where text did not provide a "contrary indication").

Moreover, the Agreement makes no distinction among different kinds of IV(c) "arrivals," say, by exempting those that are followed by return within a short, specified period of time, or those that are simply for the purpose of arraignment. Given the Agreement's language and the important consequences of starting the running of the 120-day time limit, we see no basis for such a distinction. Hence, we must assume that *every* prisoner arrival in the receiving State, whether followed by a very brief stay or a very long stay in the receiving State, triggers IV(e)'s "no return" requirement.

B

Second, even were we to assume for argument's sake that the Agreement exempts violations that, viewed in terms of the Agreement's purposes, are *de minimis*, cf. Article IX (stating that Agreement "shall be liberally construed so as to effectuate its purposes"), we could not say that the violation at issue here qualifies as trivial. That is because the purpose of the "no return" provision cannot be as Alabama and the Solicitor General describe it, namely, as a simple, direct effort to prevent the interruption of rehabilitation. A provision that prevents *returning* a prisoner who has arrived in the receiving State does not directly *increase* the number of days the prisoner will spend in rehabilitation in the sending State. Rather, it directly and intentionally *decreases* the number of days that prisoner will spend in the sending State.

This point is obvious once one keeps in mind that the trial must take place within 120 days of the prisoner's arrival in the receiving State. Article IV(e)'s requirement that the prisoner remain in the county jail means that the prisoner will spend all of those 120 days away from the sending

State's rehabilitation programs. By contrast, returning the prisoner prior to trial—in violation of Article IV(e)—would permit the prisoner to participate in the sending State's program for some of those days. But to call such a violation "technical," because it means fewer days spent away from the sending State, is to call virtually *every* conceivable anti-shuttling violation "technical"—a circumstance which, like the 13th chime of the clock, shows that Alabama's conception of the provision's purpose is seriously flawed.

Article IV(e) may seek to remove obstructions to prisoner rehabilitation in a different way. The Agreement not only prevents "return," but it also requires the receiving State to pay for the prisoner's incarceration in that State during the period prior to trial. Art. V(h) ("From the time that a party State receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending State, the [receiving] State . . . shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping, and returning the prisoner"). That requirement may provide the receiving State with an incentive to shorten the pretrial period—to proceed to trial faster than 120 days or not to seek extensions—thus disposing of detainers, and the attendant "uncertainties which obstruct programs of prisoner treatment and rehabilitation," in the most "expeditious" manner. Art. I. See also *Cuyler*, 449 U. S., at 449 (discussing negative effects of detainers on prisoners). But if that is Article IV(e)'s purpose, the transfer here was inconsistent with it. By returning Bozeman to federal prison, the county saved itself the cost of housing him—and for a nontrivial several week period, which may have allowed it to delay resolving the detainer.

Alternatively, the Agreement's drafters may have thought that the "shuttling" itself, *i. e.*, the movement back and forth among prisons, adds to the "*uncertainties* which obstruct programs of prisoner treatment and rehabilitation." Art. I

(emphasis added). And they may have sought to minimize the number of "shuttles" for that reason alone.

Viewing the Agreement in terms of either purpose, we cannot say that the one-day violation here is *de mimimis*, technical, or harmless. Neither do the briefs (or, to our knowledge, any lower court opinion) point to any other plausible rehabilitation-related purpose of Article IV(e) specifically, in terms of which the violation here might count as trivial. But we need not decide precisely what led Congress and the many other legislatures to agree to Article IV(e)'s antishuttling remedy. Given the Agreement's absolute language, it is enough to explain why Alabama's view of the Agreement's purpose is not plausible and to point to other purposes more easily squared with Article IV(e)'s text and operation.

C

Alabama and *amici* make additional claims, basically elaborating on the trial court's view that return to the sending State after a brief journey to the receiving State for pretrial purposes is helpful, not harmful, to the prisoner. But given Article IV's text, which indicates a contrary view, the parties would more appropriately address these policy arguments to legislatures.

The Solicitor General also points to a federal statutory provision that says expressly that an "order of a court dismissing any indictment, information, or complaint may be with or without prejudice," depending on the "seriousness of the offense," the "facts and circumstances of the case," and the "impact of a reprosecution on the administration of the agreement" and "on the administration of justice." 18 U. S. C. App. § 9(1), p. 695. This statutory provision, however, governs only when "the United States is a receiving State." § 9. And here the United States is not the receiving State. We fail to see how this provision helps, rather than hurts, Alabama's cause. Although we reject Alabama's interpretation of the Agreement, our decision does not bar a

receiving State from returning a prisoner when it would be mutually advantageous and the prisoner accordingly waives his rights under Article IV(e). Cf. *Hill*, 528 U. S., at 114–115 (holding that defendant may waive his rights under Art. III of the Agreement)

For these reasons, the judgment of the Alabama Supreme Court is affirmed.

It is so ordered.

Syllabus

CEDRIC KUSHNER PROMOTIONS, LTD. *v.* KING ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 00–549. Argued April 18, 2001—Decided June 11, 2001

Petitioner, a corporate promoter of boxing matches, sued Don King, the president and sole shareholder of a rival corporation, alleging that King had conducted his corporation's affairs in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), which makes it "unlawful for any person employed by or associated with any enterprise . . . to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity," 18 U. S. C. § 1962(c). The District Court, citing Circuit precedent, dismissed the complaint. In affirming, the Second Circuit expressed its view that § 1962(c) applies only where a plaintiff shows the existence of two separate entities, a "person" and a distinct "enterprise," the affairs of which that "person" improperly conducts. In this instance, the court noted, it was undisputed that King was an employee of his corporation and also acting within the scope of his authority. Under the court's analysis, King, in a legal sense, was part of the corporation, not a "person," distinct from the "enterprise," who allegedly improperly conducted the "enterprise's affairs."

Held: In the circumstances of this case, § 1962(c) requires no more than the formal legal distinction between "person" and "enterprise" (namely, incorporation); hence, the provision applies when a corporate employee unlawfully conducts the affairs of the corporation of which he is the sole owner—whether he conducts those affairs within the scope, or beyond the scope, of corporate authority. This Court does not quarrel with the basic principle that to establish liability under § 1962(c) one must allege and prove the existence of two distinct entities: (1) a "person"; and (2) an "enterprise" that is not simply the same "person" referred to by a different name. Nonetheless, the Court disagrees with the appellate court's application of that "distinctness" principle to the present circumstances, in which a corporate employee, acting within the scope of his authority, allegedly conducts the corporation's affairs in a RICO-forbidden way. The corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status. The Court can find nothing in RICO that requires more "separateness" than that.

Syllabus

Linguistically speaking, an employee who conducts his corporation's affairs through illegal acts comes within § 1962(c)'s terms forbidding any "person" unlawfully to conduct an "enterprise," particularly when RICO explicitly defines "person" to include "any individual . . . capable of holding a legal or beneficial interest in property," and defines "enterprise" to include a "corporation," §§ 1961(3), (4). And, linguistically speaking, the employee and the corporation are different "persons," even where the employee is the corporation's sole owner. Incorporation's basic purpose is to create a legal entity distinct from those natural individuals who created the corporation, who own it, or whom it employs. See, *e. g.*, *United States* v. *Bestfoods*, 524 U. S. 51, 61–62. The precedent on which the Second Circuit relied involved significantly different circumstances from those here at issue. Further, to apply RICO in these circumstances is consistent with the statute's basic purposes of protecting both a legitimate "enterprise" from those who would use unlawful acts to victimize it, *United States* v. *Turkette*, 452 U. S. 576, 591, and the public from those who would unlawfully use an "enterprise" (whether legitimate or illegitimate) as a "vehicle" through which unlawful activity is committed, *National Organization for Women, Inc.* v. *Scheidler*, 510 U. S. 249, 259. Conversely, the appellate court's critical legal distinction—between employees acting within and without the scope of corporate authority—would immunize from RICO liability many of those at whom this Court has said RICO directly aims, *e. g.*, high-ranking individuals in an illegitimate criminal enterprise, who, seeking to further the enterprise's purposes, act within the scope of their authority, cf. *Turkette*, *supra*, at 581. Finally, nothing in the statute's history significantly favors an alternative interpretation. This Court's rule is no less consistent than is the lower court's rule with the following principles cited by King: (1) the principle that a corporation acts only through its directors, officers, and agents; (2) the principle that a corporation should not be liable for its employees' criminal acts where Congress so intends; and (3) antitrust law's intracorporate conspiracy doctrine. Pp. 161–166.

219 F. 3d 115, reversed and remanded.

BREYER, J., delivered the opinion for a unanimous Court.

Richard A. Edlin argued the cause for petitioner. With him on the briefs was *Ronald D. Lefton.*

Austin C. Schlick argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Acting Solicitor General Underwood, Acting Assist-*

ant Attorney General Keeney, Deputy Solicitor General Dreeben, Deborah Watson, and *Frank J. Marine.*

Peter E. Fleming, Jr., argued the cause for respondents. With him on the brief was *Michael C. Quinn.**

JUSTICE BREYER delivered the opinion of the Court.

The Racketeer Influenced and Corrupt Organizations Act (RICO or Act), 18 U. S. C. § 1961 *et seq.*, makes it "unlawful for any person employed by or associated with any enterprise . . . to conduct or participate . . . in the conduct of such enterprise's affairs" through the commission of two or more statutorily defined crimes—which RICO calls "a pattern of racketeering activity." § 1962(c). The language suggests, and lower courts have held, that this provision foresees two separate entities, a "person" and a distinct "enterprise."

This case focuses upon a person who is the president and sole shareholder of a closely held corporation. The plaintiff claims that the president has conducted the corporation's affairs through the forbidden "pattern," though for present purposes it is conceded that, in doing so, he acted within the scope of his authority as the corporation's employee. In these circumstances, are there two entities, a "person" and a separate "enterprise"? Assuming, as we must given the posture of this case, that the allegations in the complaint are true, we conclude that the "person" and "enterprise" here are distinct and that the RICO provision applies.

Petitioner, Cedric Kushner Promotions, Ltd., is a corporation that promotes boxing matches. Petitioner sued Don King, the president and sole shareholder of Don King Productions, a corporation, claiming that King had conducted the boxing-related affairs of Don King Productions in part through a RICO "pattern," *i. e.*, through the alleged commission of at least two instances of fraud and other RICO predi-

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**Kevin P. Roddy* and *G. Robert Blakey* filed a brief for the National Association of Securities and Commercial Law Attorneys as *amicus curiae* urging reversal.

cate crimes. The District Court, citing Court of Appeals precedent, dismissed the complaint. Civ. No. 98–6859, 1999 WL 771366, *3–4 (SDNY, Sept. 28, 1999). And the Court of Appeals affirmed that dismissal. 219 F. 3d 115 (CA2 2000) *(per curiam)*. In the appellate court's view, § 1962(c) applies only where a plaintiff shows the existence of two separate entities, a "person" and a distinct "enterprise," the affairs of which that "person" improperly conducts. *Id.*, at 116. In this instance, "it is undisputed that King was an employee" of the corporation Don King Productions and also "acting within the scope of his authority." *Id.*, at 117. Under the Court of Appeals' analysis, King, in a legal sense, was part of, not separate from, the corporation. There was no "person," distinct from the "enterprise," who improperly conducted the "enterprise's affairs." And thus § 1962(c) did not apply. *Ibid.*

Other Circuits, applying § 1962(c) in roughly similar circumstances, have reached a contrary conclusion. See, *e. g.*, *Brannon* v. *Boatmen's First Nat. Bank of Okla.*, 153 F. 3d 1144, 1148, n. 4 (CA10 1998); *Richmond* v. *Nationwide Cassel L. P.*, 52 F. 3d 640, 647 (CA7 1995); *Jaguar Cars, Inc.* v. *Royal Oaks Motor Car Co.*, 46 F. 3d 258, 265, 269 (CA3 1995); *Sever* v. *Alaska Pulp Corp.*, 978 F. 2d 1529, 1534 (CA9 1992). We granted certiorari to resolve the conflict. We now agree with these Circuits and hold that the Second Circuit's interpretation of § 1962(c) is erroneous.

We do not quarrel with the basic principle that to establish liability under § 1962(c) one must allege and prove the existence of two distinct entities: (1) a "person"; and (2) an "enterprise" that is not simply the same "person" referred to by a different name. The statute's language, read as ordinary English, suggests that principle. The Act says that it applies to "person[s]" who are "employed by or associated with" the "enterprise." § 1962(c). In ordinary English one speaks of employing, being employed by, or associating with others, not oneself. See Webster's Third New International Dictionary 132 (1993) (defining "associate"); *id.*, at 743 (defin-

ing "employ"). In addition, the Act's purposes are consistent with that principle. Whether the Act seeks to prevent a person from victimizing, say, a small business, S. Rep. No. 91–617, p. 77 (1969), or to prevent a person from using a corporation for criminal purposes, *National Organization for Women, Inc.* v. *Scheidler*, 510 U. S. 249, 259 (1994), the person and the victim, or the person and the tool, are different entities, not the same.

The Government reads § 1962(c) "to require some distinctness between the RICO defendant and the RICO enterprise." Brief for United States as *Amicus Curiae* 11. And it says that this requirement is "legally sound and workable." *Ibid.* We agree with its assessment, particularly in light of the fact that 12 Courts of Appeals have interpreted the statute as embodying some such distinctness requirement without creating discernible mischief in the administration of RICO. See *St. Paul Mercury Ins. Co.* v. *Williamson*, 224 F. 3d 425, 445 (CA5 2000); *United States* v. *Goldin Industries, Inc.*, 219 F. 3d 1268, 1270 (CA11) (en banc), cert. denied, 531 U. S. 1102 (2000); *Begala* v. *PNC Bank*, 214 F. 3d 776, 781 (CA6 2000), cert. denied, 531 U. S. 1145 (2001); *Doyle* v. *Hasbro, Inc.*, 103 F. 3d 186, 190 (CA1 1996); *Richmond, supra*, at 646–647; *Gasoline Sales, Inc.* v. *Aero Oil Co.*, 39 F. 3d 70, 72–73 (CA3 1994); *Confederate Memorial Assn., Inc.* v. *Hines*, 995 F. 2d 295, 299–300 (CADC 1993); *Board of Cty. Comm'rs, San Juan Cty.* v. *Liberty Group*, 965 F. 2d 879, 885 (CA10), cert. denied, 506 U. S. 918 (1992); *River City Markets, Inc.* v. *Fleming Foods West, Inc.*, 960 F. 2d 1458, 1461 (CA9 1992); *Busby* v. *Crown Supply, Inc.*, 896 F. 2d 833, 840 (CA4 1990); *Atlas Pile Driving Co.* v. *DiCon Financial Co.*, 886 F. 2d 986, 995 (CA8 1989); *Bennett* v. *United States Trust Co. of New York*, 770 F. 2d 308, 315, and n. 2 (CA2 1985), cert. denied, 474 U. S. 1058 (1986); see also *Semiconductor Energy Laboratory Co.* v. *Samsung Electronics Co.*, 204 F. 3d 1368, 1383, n. 7 (CA Fed. 2000) (approving of distinctness requirement in dicta), cert.

denied, 531 U. S. 1050 (2001). Indeed, this Court previously has said that liability "depends on showing that the defendants conducted or participated in the conduct of the '*enterprise's* affairs,' not just their *own* affairs." *Reves* v. *Ernst & Young*, 507 U. S. 170, 185 (1993).

While accepting the "distinctness" principle, we nonetheless disagree with the appellate court's application of that principle to the present circumstances—circumstances in which a corporate employee, "acting within the scope of his authority," 219 F. 3d, at 117, allegedly conducts the corporation's affairs in a RICO-forbidden way. The corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status. And we can find nothing in the statute that requires more "separateness" than that. Cf. *McCullough* v. *Suter*, 757 F. 2d 142, 144 (CA7 1985) (finding either formal or practical separateness sufficient to be distinct under § 1962(c)).

Linguistically speaking, an employee who conducts the affairs of a corporation through illegal acts comes within the terms of a statute that forbids any "person" unlawfully to conduct an "enterprise," particularly when the statute explicitly defines "person" to include "any individual . . . capable of holding a legal or beneficial interest in property," and defines "enterprise" to include a "corporation." 18 U. S. C. §§ 1961(3), (4). And, linguistically speaking, the employee and the corporation are different "persons," even where the employee is the corporation's sole owner. After all, incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs. See *United States* v. *Bestfoods*, 524 U. S. 51, 61–62 (1998); *Burnet* v. *Clark*, 287 U. S. 410, 415 (1932); 1 W. Fletcher, Cyclopedia of the Law of Private Corporations §§ 7, 14 (rev. ed. 1999).

We note that the Second Circuit relied on earlier Circuit precedent for its decision. But that precedent involved quite different circumstances which are not presented here. This case concerns a claim that a corporate employee is the "person" and the corporation is the "enterprise." It is natural to speak of a corporate employee as a "person employed by" the corporation. § 1962(c). The earlier Second Circuit precedent concerned a claim that a corporation was the "person" and the corporation, together with all its employees and agents, were the "enterprise." See *Riverwoods Chappaqua Corp.* v. *Marine Midland Bank, N. A.*, 30 F. 3d 339, 344 (1994) (affirming dismissal of complaint). It is less natural to speak of a corporation as "employed by" or "associated with" this latter oddly constructed entity. And the Second Circuit's other precedent also involved significantly different allegations compared with the instant case. See *Anatian* v. *Coutts Bank (Switzerland) Ltd.*, 193 F. 3d 85, 89 (1999) (affirming dismissal where plaintiff alleged that same bank was both "person" and "enterprise"), cert. denied, 528 U. S. 1188 (2000); *Discon, Inc.* v. *NYNEX Corp.*, 93 F. 3d 1055, 1064 (1996) (involving complaint alleging that corporate subsidiaries were "persons" and subsidiaries, taken together as parent, were "enterprise"), vacated on other grounds, 525 U. S. 128 (1998); *Bennett*, *supra*, at 315, and n. 2 (same as *Anatian*). We do not here consider the merits of these cases, and note only their distinction from the instant case.

Further, to apply the RICO statute in present circumstances is consistent with the statute's basic purposes as this Court has defined them. The Court has held that RICO both protects a legitimate "enterprise" from those who would use unlawful acts to victimize it, *United States* v. *Turkette*, 452 U. S. 576, 591 (1981), and also protects the public from those who would unlawfully use an "enterprise" (whether legitimate or illegitimate) as a "vehicle" through which "unlawful . . . activity is committed," *National Organization for Women, Inc.*, *supra*, at 259. A corporate

employee who conducts the corporation's affairs through an unlawful RICO "pattern . . . of activity," § 1962(c), uses that corporation as a "vehicle" whether he is, or is not, its sole owner.

Conversely, the appellate court's critical legal distinction—between employees acting within the scope of corporate authority and those acting outside that authority—is inconsistent with a basic statutory purpose. Cf. *Reves*, *supra*, at 184 (stating that an enterprise is "'operated,'" within § 1962(c)'s meaning, "not just by upper management but also by lower rung participants in the enterprise *who are under the direction of upper management*" (emphasis added)). It would immunize from RICO liability many of those at whom this Court has said RICO directly aims—*e. g.*, high-ranking individuals in an illegitimate criminal enterprise, who, seeking to further the purposes of that enterprise, act within the scope of their authority. Cf. *Turkette*, *supra*, at 581 (Congress "did nothing to indicate that an enterprise consisting of a group of individuals was not covered by RICO if the purpose of the enterprise was exclusively criminal").

Finally, we have found nothing in the statute's history that significantly favors an alternative interpretation. That history not only refers frequently to the importance of undermining organized crime's influence upon legitimate businesses but also refers to the need to protect the public from those who would run "organization[s] in a manner detrimental to the public interest." S. Rep. No. 91–617, at 82. This latter purpose, as we have said, invites the legal principle we endorse, namely, that in present circumstances the statute requires no more than the formal legal distinction between "person" and "enterprise" (namely, incorporation) that is present here.

In reply, King argues that the lower court's rule is consistent with (1) the principle that a corporation acts only through its directors, officers, and agents, 1 Fletcher, *supra*, § 30, (2) the principle that a corporation should not be liable

for the criminal acts of its employees where Congress so intends, Brief for Respondents 20–21, and (3) the Sherman Act principle limiting liability under 15 U. S. C. § 1 by excluding "from unlawful combinations or conspiracies the activities of a single firm," *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U. S. 752, 769–770, n. 15 (1984). The alternative that we endorse, however, is no less consistent with these principles. It does not deny that a corporation acts through its employees; it says only that the corporation and its employees are not legally identical. It does not assert that ordinary *respondeat superior* principles make a corporation legally liable under RICO for the criminal acts of its employees; that is a matter of congressional intent not before us. See, *e. g.*, *Gasoline Sales, Inc.*, 39 F. 3d, at 73 (holding that corporation cannot be "vicariously liable" for § 1962(c) violations committed by its vice president). Neither is it inconsistent with antitrust law's intracorporate conspiracy doctrine; that doctrine turns on specific antitrust objectives. See *Copperweld Corp.*, *supra*, at 770–771. Rather, we hold simply that the need for two distinct entities is satisfied; hence, the RICO provision before us applies when a corporate employee unlawfully conducts the affairs of the corporation of which he is the sole owner—whether he conducts those affairs within the scope, or beyond the scope, of corporate authority.

For these reasons, the Court of Appeals' judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

DUNCAN, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY *v.* WALKER

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 00–121. Argued March 26, 2001—Decided June 18, 2001

The time during which an "application for State post-conviction or other collateral review" is pending tolls the limitation period for filing federal habeas petitions. 28 U. S. C. § 2244(d)(2). Before the April 24, 1996, effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), respondent's state robbery conviction became final. He filed, *inter alia*, a federal habeas petition under § 2254. The District Court dismissed the petition without prejudice because it was not apparent that respondent had exhausted available state remedies. On May 20, 1997, without having returned to state court, respondent filed another federal habeas petition. The District Court dismissed that petition because respondent had not filed within a reasonable time from AEDPA's effective date. In reversing, the Second Circuit found that respondent's first federal habeas petition was an application for "other collateral review" that tolled the limitation period under § 2244(d)(2) and made his current petition timely.

Held: A federal habeas petition is not an "application for State post-conviction or other collateral review" within the meaning of § 2244(d)(2). As a result, § 2244(d)(2) did not toll the limitation period during the pendency of respondent's first federal habeas petition. The Court begins with the language of the statute. See, *e. g.*, *Williams* v. *Taylor*, 529 U. S. 420, 431. Petitioner's contention that "State" applies to the entire phrase "post-conviction or other collateral review" is correct. To begin with, Congress placed "State" before that phrase without specifically naming any kind of "Federal" review. The fact that other AEDPA provisions denominate expressly both "State" and "Federal" proceedings, see, *e. g.*, § 2254(i), supplies strong evidence that Congress would have mentioned "Federal" review expressly had Congress intended to include federal review. See *Bates* v. *United States*, 522 U. S. 23, 29–30. Respondent's contrary construction would render the word "State" insignificant, if not wholly superfluous. This Court's duty to give effect, where possible, to every word of a statute, *United States* v. *Menasche*, 348 U. S. 528, 538–539, makes the Court reluctant to treat statutory terms as surplusage. This is especially so when the

term occupies so pivotal a place in the statutory scheme as the word "State" in the federal habeas statute. But under respondent's rendition, "State" has no operative effect on the scope of § 2244(d)(2). The clause would have precisely the same content were it to read "post-conviction or other collateral review." Contrary to the Second Circuit's characterization, petitioner's interpretation does not yield the linguistic oddity "State other collateral review," but more naturally yields the understanding "other State collateral review." Further, that court's reasoning that the phrase "other collateral review" would be rendered meaningless if it did not refer to federal habeas petitions depends on the incorrect premise that the only state "collateral" review is "post-conviction" review. "[O]ther collateral review" could include, *e. g.*, a state court civil commitment or civil contempt order. Congress also may have used "post-conviction or other collateral" in recognition of the diverse terminology that different States employ to represent the different forms of collateral review that are available after a conviction. Examination of the AEDPA provision establishing the limitation period for filing § 2254 petitions in state capital cases, § 2263(b)(2), shows that Congress used the disjunctive clause "post-conviction review or other collateral relief" where the latter term could not possibly include anything federal within its ambit. Petitioner's construction is also far more consistent than respondent's with AEDPA's purpose to further the principles of comity, finality, and federalism. Respondent contends that petitioner's interpretation creates the potential for unfairness to litigants who file timely federal petitions that are dismissed without prejudice after the limitation period has expired. But the Court's sole task here is one of statutory construction. And in light of the facts that respondent never cured the defects that led to the dismissal of his first federal petition during the remaining nine months of the limitation period, and that his 1996 and 1997 petitions contained different claims, this Court has no occasion to address alternative scenarios. Pp. 172–182.

208 F. 3d 357, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. SOUTER, J., filed a concurring opinion, *post*, p. 182. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, in which SOUTER, J., joined, *post*, p. 182. BREYER, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 185.

Preeta D. Bansal, Solicitor General of New York, argued the cause for petitioner. With her on the briefs were *Eliot*

Spitzer, Attorney General, *Daniel Smirlock*, Deputy Solicitor General, and *David Axinn*, *Robert H. Easton*, *Robin Forshaw*, and *Martin A. Hotvet*, Assistant Solicitors General.

Deborah Wolikow Loewenberg, by appointment of the Court, 531 U. S. 1066, argued the cause for respondent. With her on the brief were *John H. Blume* and *Keir M. Weyble*.*

JUSTICE O'CONNOR delivered the opinion of the Court.

Title 28 U. S. C. § 2244(d)(2) (1994 ed., Supp. V) provides: "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." This case presents the question whether a federal habeas corpus petition is an "application for State post-conviction or other collateral review" within the meaning of this provision.

I

In 1992, several judgments of conviction for robbery were entered against respondent Sherman Walker in the

*A brief of *amici curiae* urging reversal was filed for the Commonwealth of Massachusetts et al. by *Thomas F. Reilly*, Attorney General of Massachusetts, and *Catherine E. Sullivan* and *William J. Meade*, Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *Bill Pryor* of Alabama, *M. Jane Brady* of Delaware, *Earl Anzai* of Hawaii, *Thomas J. Miller* of Iowa, *J. Joseph Curran, Jr.*, of Maryland, *Michael C. Moore* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Betty D. Montgomery* of Ohio, *D. Michael Fisher* of Pennsylvania, *Mark Barnett* of South Dakota, *Paul G. Summers* of Tennessee, *Mark L. Shurtleff* of Utah, *Mark L. Earley* of Virginia, *Christine O. Gregoire* of Washington, and *Darrel V. McGraw, Jr.*, of West Virginia.

Leon Friedman and *Joshua L. Dratel* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance.

Kent S. Scheidegger filed a brief for the Criminal Justice Legal Foundation as *amicus curiae*.

New York state courts. The last of these convictions came in June 1992, when respondent pleaded guilty to robbery in the first degree in the New York Supreme Court, Queens County. Respondent was sentenced to 7 to 14 years in prison on this conviction.

Respondent unsuccessfully pursued a number of state remedies in connection with his convictions. It is unnecessary to describe all of these proceedings herein. Respondent's last conviction was affirmed on June 12, 1995. Respondent was later denied leave to appeal to the New York Court of Appeals. Respondent also sought a writ of error *coram nobis*, which the Appellate Division denied on March 18, 1996. Respondent's last conviction became final in April 1996, prior to the April 24, 1996, effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214.

In a single document dated April 10, 1996, respondent filed a complaint under Rev. Stat. § 1979, 42 U. S. C. § 1983, and a petition for habeas corpus under 28 U. S. C. § 2254 in the United States District Court for the Eastern District of New York. On July 9, 1996, the District Court dismissed the complaint and petition without prejudice. With respect to the habeas petition, the District Court, citing § 2254(b), concluded that respondent had not adequately set forth his claim because it was not apparent that respondent had exhausted available state remedies. The District Court noted that, for example, respondent had failed to specify the claims litigated in the state appellate proceedings relating to his robbery convictions.

On May 20, 1997, more than one year after AEDPA's effective date, respondent filed another federal habeas petition in the same District Court. It is undisputed that respondent had not returned to state court since the dismissal of his first federal habeas filing. On May 6, 1998, the District Court dismissed the petition as time barred because

respondent had not filed the petition within a "reasonable time" from AEDPA's effective date.

The United States Court of Appeals for the Second Circuit reversed the District Court's judgment, reinstated the habeas petition, and remanded the case for further proceedings. *Walker* v. *Artuz*, 208 F. 3d 357 (2000). The Court of Appeals noted at the outset that, because respondent's conviction had become final prior to AEDPA's effective date, he had until April 24, 1997, to file his federal habeas petition. The court also observed that the exclusion from the limitation period of the time during which respondent's first federal habeas petition was pending in the District Court would render the instant habeas petition timely.

The Court of Appeals held that respondent's first federal habeas petition had tolled the limitation period because it was an application for "other collateral review" within the meaning of § 2244(d)(2). The court characterized the disjunctive "or" between "post-conviction" and "other collateral" as creating a "distinct break" between two kinds of review. *Id.*, at 359. The court also stated that application of the word "State" to both "post-conviction" and "other collateral" would create a "linguistic oddity" in the form of the construction "State other collateral review." *Id.*, at 360. The court further reasoned that the phrase "other collateral review" would be meaningless if it did not refer to federal habeas petitions. The court therefore concluded that the word "State" modified only "post-conviction."

The Court of Appeals also found no conflict between its interpretation of the statute and the purpose of AEDPA. The court found instead that its construction would promote the goal of encouraging petitioners to file their federal habeas applications as soon as possible.

We granted certiorari, 531 U. S. 991 (2000), to resolve a conflict between the Second Circuit's decision and the decisions of three other Courts of Appeals. See *Jiminez* v. *Rice*, 222 F. 3d 1210 (CA9 2000); *Grooms* v. *Johnson*, 208 F. 3d 488

(CA5 1999) *(per curiam); Jones* v. *Morton,* 195 F. 3d 153 (CA3 1999). One other Court of Appeals has since adopted the Second Circuit's view. *Petrick* v. *Martin,* 236 F. 3d 624 (CA10 2001). We now reverse.

II

Our task is to construe what Congress has enacted. We begin, as always, with the language of the statute. See, *e. g., Williams* v. *Taylor,* 529 U. S. 420, 431 (2000); *Public Employees Retirement System of Ohio* v. *Betts,* 492 U. S. 158, 175 (1989); *Watt* v. *Energy Action Ed. Foundation,* 454 U. S. 151, 162 (1981). Respondent reads § 2244(d)(2) to apply the word "State" only to the term "post-conviction" and not to the phrase "other collateral." Under this view, a properly filed federal habeas petition tolls the limitation period. Petitioner contends that the word "State" applies to the entire phrase "post-conviction or other collateral review." Under this view, a properly filed federal habeas petition does not toll the limitation period.

We believe that petitioner's interpretation of § 2244(d)(2) is correct for several reasons. To begin with, Congress placed the word "State" before "post-conviction or other collateral review" without specifically naming any kind of "Federal" review. The essence of respondent's position is that Congress used the phrase "other collateral review" to incorporate federal habeas petitions into the class of applications for review that toll the limitation period. But a comparison of the text of § 2244(d)(2) with the language of other AEDPA provisions supplies strong evidence that, had Congress intended to include federal habeas petitions within the scope of § 2244(d)(2), Congress would have mentioned "Federal" review expressly. In several other portions of AEDPA, Congress specifically used both the words "State" and "Federal" to denote state and federal proceedings. For example, 28 U. S. C. § 2254(i) (1994 ed., Supp. V) provides: "The ineffectiveness or incompetence of counsel

during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." Likewise, the first sentence of 28 U. S. C. § 2261(e) (1994 ed., Supp. V) provides: "The ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under section 2254." The second sentence of § 2261(e) states: "This limitation shall not preclude the appointment of different counsel, on the court's own motion or at the request of the prisoner, at any phase of State or Federal post-conviction proceedings on the basis of the ineffectiveness or incompetence of counsel in such proceedings." Finally, 28 U. S. C. § 2264(a)(3) (1994 ed., Supp. V) excuses a state capital prisoner's failure to raise a claim properly in state court where the failure is "based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for State or Federal post-conviction review."

Section 2244(d)(2), by contrast, employs the word "State," but not the word "Federal," as a modifier for "review." It is well settled that "'[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Bates* v. *United States*, 522 U. S. 23, 29–30 (1997) (quoting *Russello* v. *United States*, 464 U. S. 16, 23 (1983)). We find no likely explanation for Congress' omission of the word "Federal" in § 2244(d)(2) other than that Congress did not intend properly filed applications for federal review to toll the limitation period. It would be anomalous, to say the least, for Congress to usher in federal review under the generic rubric of "other collateral review" in a statutory provision that refers expressly to "State" review, while denominating expressly both "State" and "Federal" proceedings in other parts of the same statute. The anomaly is underscored by the fact that the words

"State" and "Federal" are likely to be of no small import when Congress drafts a statute that governs federal collateral review of state court judgments.

Further, were we to adopt respondent's construction of the statute, we would render the word "State" insignificant, if not wholly superfluous. "It is our duty 'to give effect, if possible, to every clause and word of a statute.'" *United States* v. *Menasche*, 348 U. S. 528, 538–539 (1955) (quoting *Montclair* v. *Ramsdell*, 107 U. S. 147, 152 (1883)); see also *Williams* v. *Taylor*, 529 U. S. 362, 404 (2000) (describing this rule as a "cardinal principle of statutory construction"); *Market Co.* v. *Hoffman*, 101 U. S. 112, 115 (1879) ("As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant'"). We are thus "reluctan[t] to treat statutory terms as surplusage" in any setting. *Babbitt* v. *Sweet Home Chapter, Communities for Great Ore.*, 515 U. S. 687, 698 (1995); see also *Ratzlaf* v. *United States*, 510 U. S. 135, 140 (1994). We are especially unwilling to do so when the term occupies so pivotal a place in the statutory scheme as does the word "State" in the federal habeas statute. But under respondent's rendition of § 2244(d)(2), Congress' inclusion of the word "State" has no operative effect on the scope of the provision. If the phrase "State post-conviction or other collateral review" is construed to encompass both state and federal collateral review, then the word "State" places no constraint on the class of applications for review that toll the limitation period. The clause instead would have precisely the same content were it to read "post-conviction or other collateral review."

The most that could then be made of the word "State" would be to say that Congress singled out applications for "State post-conviction" review as one example from the universe of applications for collateral review. Under this approach, however, the word "State" still does nothing to

delimit the entire class of applications for review that toll the limitation period. A construction under which the word "State" does nothing more than further modify "post-conviction" relegates "State" to quite an insignificant role in the statutory provision. We believe that our duty to "give each word some operative effect" where possible, *Walters* v. *Metropolitan Ed. Enterprises, Inc.*, 519 U. S. 202, 209 (1997), requires more in this context.

The Court of Appeals characterized petitioner's interpretation as producing the "linguistic oddity" of "State other collateral review," which is "an ungainly construction that [the Court of Appeals did] not believe Congress intended." 208 F. 3d, at 360. But nothing precludes the application of the word "State" to the entire phrase "post-conviction or other collateral review," regardless of the resulting construction that one posits. The term "other collateral" is easily understood as a unit to which "State" applies just as "State" applies to "post-conviction." Moreover, petitioner's interpretation does not compel the verbal formula hypothesized by the Court of Appeals. Indeed, the ungainliness of "State other collateral review" is a very good reason why Congress might have avoided that precise verbal formulation in the first place. The application of the word "State" to the phrase "other collateral review" more naturally yields the understanding "other State collateral review."

The Court of Appeals also reasoned that petitioner's reading of the statute fails to give operative effect to the phrase "other collateral review." The court claimed that "the phrase 'other collateral review' would be meaningless if it did not refer to federal habeas petitions." *Ibid.* This argument, however, fails because it depends on the incorrect premise that there can be no form of state "collateral" review "other" than state "post-conviction" review within the meaning of § 2244(d)(2). To the contrary, it is possible for "other collateral review" to include review of a state court judgment that is not a criminal conviction.

Section 2244(d)(1)'s 1-year limitation period applies to "an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." Section 2244(d)(2) provides for tolling during the pendency of "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim." Nothing in the language of these provisions requires that the state court judgment pursuant to which a person is in custody be a criminal conviction. Nor does 28 U. S. C. § 2254 (1994 ed. and Supp. V) by its terms apply only to those in custody pursuant to a state criminal conviction. See, *e. g.*, § 2254(a) ("a person in custody pursuant to the judgment of a State court"); § 2254(b)(1) ("a person in custody pursuant to the judgment of a State court"); § 2254(d) ("a person in custody pursuant to the judgment of a State court"); § 2254(e)(1) ("a person in custody pursuant to the judgment of a State court").

Incarceration pursuant to a state criminal conviction may be by far the most common and most familiar basis for satisfaction of the "in custody" requirement in § 2254 cases. But there are other types of state court judgments pursuant to which a person may be held in custody within the meaning of the federal habeas statute. For example, federal habeas corpus review may be available to challenge the legality of a state court order of civil commitment or a state court order of civil contempt. See, *e. g.*, *Francois* v. *Henderson*, 850 F. 2d 231 (CA5 1988) (entertaining a challenge brought in a federal habeas petition under § 2254 to a state court's commitment of a person to a mental institution upon a verdict of not guilty by reason of insanity); *Leonard* v. *Hammond*, 804 F. 2d 838 (CA4 1986) (holding that constitutional challenges to civil contempt orders for failure to pay child support were cognizable only in a habeas corpus action). These types of state court judgments neither constitute nor require criminal convictions. Any state collateral review that is available with respect to these judgments, strictly speak-

ing, is not post-conviction review. Accordingly, even if "'"State post-conviction review" means all collateral review of a conviction provided by a state,'" 208 F. 3d, at 360 (quoting *Barrett* v. *Yearwood*, 63 F. Supp. 2d 1245, 1250 (ED Cal. 1999)), the phrase "other collateral review" need not include federal habeas petitions in order to have independent meaning.

Congress also may have employed the construction "post-conviction or other collateral" in recognition of the diverse terminology that different States employ to represent the different forms of collateral review that are available after a conviction. In some jurisdictions, the term "post-conviction" may denote a particular procedure for review of a conviction that is distinct from other forms of what conventionally is considered to be postconviction review. For example, Florida employs a procedure that is officially entitled a "Motion to Vacate, Set Aside, or Correct Sentence." Fla. Rule Crim. Proc. 3.850 (2001). The Florida courts have commonly referred to a Rule 3.850 motion as a "motion for post-conviction relief" and have distinguished this procedure from other vehicles for collateral review of a criminal conviction, such as a state petition for habeas corpus. See, *e. g.*, *Bryant* v. *State*, 780 So. 2d 978, 979 (Fla. App. 2001) ("[A] petition for habeas corpus cannot be used to circumvent the two-year period for filing motions for post-conviction relief"); *Finley* v. *State*, 394 So. 2d 215, 216 (Fla. App. 1981) ("[T]he remedy of habeas corpus is not available as a substitute for post-conviction relief under Rule 3.850"). Congress may have refrained from exclusive reliance on the term "post-conviction" so as to leave no doubt that the tolling provision applies to all types of state collateral review available after a conviction and not just to those denominated "post-conviction" in the parlance of a particular jurisdiction.

Examination of another AEDPA provision also demonstrates that "other collateral" need not refer to any form of

federal review in order to have meaning. Title 28 U. S. C. § 2263 (1994 ed., Supp. V) establishes the limitation period for filing § 2254 petitions in state capital cases that arise from jurisdictions meeting the "opt-in" requirements of § 2261. Section 2263(b)(2) provides that the limitation period "shall be tolled from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition." The reference to "the final State court disposition of such petition" makes it clear that only petitions filed in state court, and not petitions for federal review, toll the limitation period in capital cases. Congress therefore used the phrases "post-conviction review" and "other collateral relief" in a disjunctive clause where the term "other collateral," whatever its precise content, could not possibly include anything federal within its ambit. This illustration vitiates any suggestion that "other collateral" relief or review must include federal relief or review in order for the term to have any significance apart from "post-conviction" review.

Consideration of the competing constructions in light of AEDPA's purposes reinforces the conclusion that we draw from the text. Petitioner's interpretation of the statute is consistent with "AEDPA's purpose to further the principles of comity, finality, and federalism." *Williams*, 529 U. S., at 436. Specifically, under petitioner's construction, § 2244(d)(2) promotes the exhaustion of state remedies while respecting the interest in the finality of state court judgments. Under respondent's interpretation, however, the provision would do far less to encourage exhaustion prior to seeking federal habeas review and would hold greater potential to hinder finality.

The exhaustion requirement of § 2254(b) ensures that the state courts have the opportunity fully to consider federal-law challenges to a state custodial judgment before the lower federal courts may entertain a collateral attack upon that

judgment. See, *e. g.*, *O'Sullivan* v. *Boerckel*, 526 U. S. 838, 845 (1999) ("[T]he exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts"); *Rose* v. *Lundy*, 455 U. S. 509, 518–519 (1982) ("A rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error"). This requirement "is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings." *Id.*, at 518. The exhaustion rule promotes comity in that "'it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation.'" *Ibid.* (quoting *Darr* v. *Burford*, 339 U. S. 200, 204 (1950)); see also *O'Sullivan*, *supra*, at 844 ("Comity thus dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief").

The 1-year limitation period of § 2244(d)(1) quite plainly serves the well-recognized interest in the finality of state court judgments. See generally *Calderon* v. *Thompson*, 523 U. S. 538, 555–556 (1998). This provision reduces the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review.

The tolling provision of § 2244(d)(2) balances the interests served by the exhaustion requirement and the limitation period. Section 2244(d)(2) promotes the exhaustion of state remedies by protecting a state prisoner's ability later to apply for federal habeas relief while state remedies are being pursued. At the same time, the provision limits the

harm to the interest in finality by according tolling effect only to "properly filed application[s] for State post-conviction or other collateral review."

By tolling the limitation period for the pursuit of state remedies and not during the pendency of applications for federal review, § 2244(d)(2) provides a powerful incentive for litigants to exhaust all available state remedies before proceeding in the lower federal courts. But if the statute were construed so as to give applications for federal review the same tolling effect as applications for state collateral review, then § 2244(d)(2) would furnish little incentive for individuals to seek relief from the state courts before filing federal habeas petitions. The tolling provision instead would be indifferent between state and federal filings. While other statutory provisions, such as § 2254(b) itself, of course, would still provide individuals with good reason to exhaust, § 2244(d)(2) would be out of step with this design. At the same time, respondent's interpretation would further undermine the interest in finality by creating more potential for delay in the adjudication of federal law claims.

A diminution of statutory incentives to proceed first in state court would also increase the risk of the very piecemeal litigation that the exhaustion requirement is designed to reduce. Cf. *Rose*, 455 U. S., at 520. We have observed that "strict enforcement of the exhaustion requirement will encourage habeas petitioners to exhaust all of their claims in state court and to present the federal court with a single habeas petition." *Ibid.* But were we to adopt respondent's construction of § 2244(d)(2), we would dilute the efficacy of the exhaustion requirement in achieving this objective. Tolling the limitation period for a federal habeas petition that is dismissed without prejudice would thus create more opportunities for delay and piecemeal litigation without advancing the goals of comity and federalism that the exhaustion requirement serves. We do not believe that Congress designed the statute in this manner.

The Court of Appeals reasoned that its interpretation of the statute would further Congress' goal "to spur defendants to file their federal habeas petitions more quickly." 208 F. 3d, at 361. But this view fails to account sufficiently for AEDPA's clear purpose to encourage litigants to pursue claims in state court prior to seeking federal collateral review. See, *e. g.*, §§ 2254(b), 2254(e)(2), 2264(a). Section 2244(d)(1)'s limitation period and § 2244(d)(2)'s tolling provision, together with § 2254(b)'s exhaustion requirement, encourage litigants *first* to exhaust all state remedies and *then* to file their federal habeas petitions as soon as possible.

Respondent contends that petitioner's construction of the statute creates the potential for unfairness to litigants who file timely federal habeas petitions that are dismissed without prejudice after the limitation period has expired. But our sole task in this case is one of statutory construction, and upon examining the language and purpose of the statute, we are convinced that § 2244(d)(2) does not toll the limitation period during the pendency of a federal habeas petition.

We also note that, when the District Court dismissed respondent's first federal habeas petition without prejudice, respondent had more than nine months remaining in the limitation period in which to cure the defects that led to the dismissal. It is undisputed, however, that petitioner neither returned to state court nor filed a nondefective federal habeas petition before this time had elapsed. Respondent's May 1997 federal habeas petition also contained claims different from those presented in his April 1996 petition. In light of these facts, we have no occasion to address the alternative scenarios that respondent describes. We also have no occasion to address the question that JUSTICE STEVENS raises concerning the availability of equitable tolling.

We hold that an application for federal habeas corpus review is not an "application for State post-conviction or other collateral review" within the meaning of 28 U. S. C. § 2244(d)(2). Section 2244(d)(2) therefore did not toll the

limitation period during the pendency of respondent's first federal habeas petition. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SOUTER, concurring.

Although I join the Court's opinion in full, I have joined JUSTICE STEVENS's separate opinion pointing out that nothing bars a district court from retaining jurisdiction pending complete exhaustion of state remedies, and that a claim for equitable tolling could present a serious issue on facts different from those before us.

JUSTICE STEVENS, with whom JUSTICE SOUTER joins, concurring in part and concurring in the judgment.

For substantially the reasons stated in the Court's opinion, *ante*, at 172–178, I agree that the better reading of 28 U. S. C. § 2244(d)(2) (1994 ed., Supp. V) is that it encompasses only "State" applications for "post-conviction or other collateral review." Thus, as the Court holds, "an application for federal habeas corpus review is not an 'application for State post-conviction or other collateral review' within the meaning of 28 U. S. C. § 2244(d)(2)." *Ante*, at 181. I write separately to add two observations regarding the equitable powers of the federal courts, which are unaffected by today's decision construing a single provision of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214.

First, although the Court's pre-AEDPA decision in *Rose* v. *Lundy*, 455 U. S. 509, 522 (1982), prescribed the dismissal of federal habeas corpus petitions containing unexhausted claims, in our post-AEDPA world there is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete

exhaustion of state remedies. Indeed, there is every reason to do so when AEDPA gives a district court the alternative of simply denying a petition containing unexhausted but nonmeritorious claims, see 28 U. S. C. § 2254(b)(2) (1994 ed., Supp. V), and when the failure to retain jurisdiction would foreclose federal review of a meritorious claim because of the lapse of AEDPA's 1-year limitations period.

Second, despite the Court's suggestion that tolling the limitations period for a first federal habeas petition would undermine the "purposes" of AEDPA, see *ante*, at 178–182, neither the Court's narrow holding, nor anything in the text or legislative history of AEDPA, precludes a federal court from deeming the limitations period tolled for such a petition as a matter of equity. The Court's opinion does not address a federal court's ability to toll the limitations period apart from § 2244(d)(2). See *ante*, at 181. Furthermore, a federal court might very well conclude that tolling is appropriate based on the reasonable belief that Congress could not have intended to bar federal habeas review for petitioners who invoke the court's jurisdiction within the 1-year interval prescribed by AEDPA.

After all, federal habeas corpus has evolved as the product of both judicial doctrine and statutory law. See generally E. Chemerinsky, Federal Jurisdiction § 15 (3d ed. 1999). In the context of AEDPA's 1-year limitations period, which by its terms runs from "the date on which the judgment became final," see § 2244(d)(1)(A), the Courts of Appeals have uniformly created a 1-year grace period, running from the date of AEDPA's enactment, for prisoners whose state convictions became final prior to AEDPA.[1] Similarly, federal

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[1] See, *e. g.*, *Gaskins* v. *Duval*, 183 F. 3d 8, 9 (CA1 1999); *Ross* v. *Artuz*, 150 F. 3d 97, 100–103 (CA2 1998); *Burns* v. *Morton*, 134 F. 3d 109, 111–112 (CA3 1998); *Brown* v. *Angelone*, 150 F. 3d 370, 374–376 (CA4 1998); *United States* v. *Flores*, 135 F. 3d 1000, 1002, n. 7, 1006 (CA5 1998); *Austin* v. *Mitchell*, 200 F. 3d 391, 393 (CA6 1999); *Lindh* v. *Murphy*, 96 F. 3d 856,

courts may well conclude that Congress simply overlooked the class of petitioners whose timely filed habeas petitions remain pending in district court past the limitations period, only to be dismissed after the court belatedly realizes that one or more claims have not been exhausted.[2] See *post*, at 186 (BREYER, J., dissenting) (district courts on average take 268 days to dismiss petitions on procedural grounds; 10% remain pending more than 2 years). As a result, equitable considerations may make it appropriate for federal courts to fill in a perceived omission on the part of Congress by tolling AEDPA's statute of limitations for unexhausted federal habeas petitions. Today's ruling does not preclude that possibility, given the limited issue presented in this case and the Court's correspondingly limited holding.[3]

I concur in the Court's holding on the understanding that it does not foreclose either of the above safeguards against the potential for injustice that a literal reading of § 2244(d)(2) might otherwise produce.

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866 (CA7 1996) (en banc), rev'd on other grounds, 521 U. S. 320 (1997); *Ford* v. *Bowersox*, 178 F. 3d 522, 523 (CA8 1999); *Calderon* v. *District Court*, 128 F. 3d 1283, 1286–1287 (CA9 1997), overruled on other grounds, 163 F. 3d 530, 539–540 (CA9 1998); *Hoggro* v. *Boone*, 150 F. 3d 1223, 1225–1226 (CA10 1998); *Wilcox* v. *Florida Dept. of Corrections*, 158 F. 3d 1209, 1211 (CA11 1998).

[2] The question whether a claim has been exhausted can often be a difficult one, not just for prisoners unschooled in the immense complexities of federal habeas corpus law, see *post*, at 190–191 (BREYER, J., dissenting), but also for district courts, see, *e. g.*, *Morgan* v. *Bennett*, 204 F. 3d 360, 369–371 (CA2 2000) (disagreeing with District Court's conclusion that claim had not been exhausted); *Bear* v. *Boone*, 173 F. 3d 782, 784–785 (CA10 1999) (same).

[3] Thus the court below, which resolved the case based on its reading of 28 U. S. C. § 2244(d)(2) (1994 ed., Supp. V), and which therefore did not reach the question whether it "should exercise its equitable powers to exclude the [time] during which the first [habeas] petition was pending," 208 F. 3d 357, 362 (CA2 2000), is free to consider the issue on remand.

JUSTICE BREYER, with whom JUSTICE GINSBURG joins, dissenting.

The federal habeas corpus statute limits the period of time during which a state prisoner may file a federal habeas petition to one year, ordinarily running from the time the prisoner's conviction becomes final in the state courts. See 28 U. S. C. § 2244(d) (1994 ed., Supp. V). Section 2244(d)(2) tolls that 1-year period while "a properly filed application for State post-conviction or other collateral review . . . is pending." The question before us is whether this tolling provision applies to federal, as well as state, collateral review proceedings. Do the words "other collateral review" encompass federal habeas corpus proceedings? I believe that they do.

To understand my conclusion, one must understand why the legal issue before us is significant. Why would a state prisoner ever want federal habeas corpus proceedings to toll the federal habeas corpus limitations period? After all, the very point of tolling is to provide a state prisoner adequate time to file a federal habeas petition. If the prisoner has already filed that petition, what need is there for further tolling?

The answer to this question—and the problem that gives rise to the issue before us—is that a federal court may be required to dismiss a state prisoner's federal habeas petition, not on the merits, but because that prisoner has not exhausted his state collateral remedies for every claim presented in the federal petition. See 28 U. S. C. § 2254(b)(1) (1994 ed., Supp. V) (requiring petitioners to exhaust state remedies before filing federal habeas petition); cf. *Rose* v. *Lundy*, 455 U. S. 509, 510 (1982) (holding, under predecessor to current § 2254, that district courts cannot reach the merits of "mixed" petitions containing both exhausted and unexhausted claims). Such a dismissal means that a prisoner wishing to pursue the claim must return to state court,

pursue his state remedies, and then, if he loses, again file a federal habeas petition in federal court. All this takes time. The statute tolls the 1-year limitations period during the time the prisoner proceeds in the state courts. But unless the statute also tolls the limitations period during the time the defective petition was pending in federal court, the state prisoner may find, when he seeks to return to federal court, that he has run out of time.

This possibility is not purely theoretical. A Justice Department study indicates that 63% of all habeas petitions are dismissed, and 57% of those are dismissed for failure to exhaust state remedies. See U. S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, Federal Habeas Corpus Review: Challenging State Court Criminal Convictions 17 (1995) (hereinafter Federal Habeas Corpus Review). And it can take courts a significant amount of time to dispose of even those petitions that are not addressed on the merits; on the average, district courts took 268 days to dismiss petitions on procedural grounds. *Id.*, at 23–24; see also *id.*, at 19 (of all habeas petitions, nearly half were pending in the district court for six months or longer; 10% were pending more than two years). Thus, if the words "other collateral review" do not include federal collateral review, a large group of federal habeas petitioners, seeking to return to federal court after subsequent state-court rejection of an unexhausted claim, may find their claims time barred. Moreover, because district courts vary substantially in the time they take to rule on habeas petitions, two identically situated prisoners can receive opposite results. If Prisoner *A* and Prisoner *B* file mixed petitions in different district courts six months before the federal limitations period expires, and the court takes three months to dismiss Prisoner *A*'s petition, but seven months to dismiss Prisoner *B*'s petition, Prisoner *A* will be able to return to federal court after exhausting state remedies, but Prisoner *B*—due to no fault of his own—may not.

On the other hand, if the words "other collateral review" include federal collateral review, state prisoners whose federal claims have been dismissed for nonexhaustion will simply add to the 1-year limitations period the time they previously spent in both state and federal proceedings. Other things being equal, they will be able to return to federal court after pursuing the state remedies that remain available. And similarly situated prisoners will not suffer different outcomes simply because they file their petitions in different district courts.

The statute's language, read by itself, does not tell us whether the words "State post-conviction or other collateral review" include federal habeas proceedings. Rather, it is simply unclear whether Congress intended the word "State" to modify "post-conviction" review alone, or also to modify "other collateral review" (as the majority believes). Indeed, most naturally read, the statute refers to two distinct kinds of applications: (1) applications for "State post-conviction" review and (2) applications for "other collateral review," a broad category that, on its face, would include applications for federal habeas review. The majority's reading requires either an unusual intonation—"*State* post-conviction-or-other-collateral *review*"—or a slight rewrite of the language, by inserting the word "State" where it does not appear, between "other" and "collateral." Regardless, I believe that either reading is possible. The statute's words, by themselves, have no singular "plain meaning."

Neither do I believe that the various interpretive canons to which the majority appeals can solve the problem. Invoking the principle that "'Congress acts intentionally and purposely in the disparate inclusion or exclusion'" of particular words, *Bates* v. *United States*, 522 U. S. 23, 29–30 (1997) (quoting *Russello* v. *United States*, 464 U. S. 16, 23 (1983)), the majority attempts to ascertain Congress' intent by looking to the tolling provision's statutory neighbors. It points to other provisions where Congress explicitly used the

words "State" and "Federal" together, expressing its intent to cover both kinds of proceedings. See *ante*, at 172–173 (citing 28 U. S. C. § 2254(i) (1994 ed., Supp. V); § 2261(e); § 2264(a)(3)). And it reasons that Congress' failure to do so here displays a different intent.

But other statutory neighbors show that, when Congress wished unambiguously to limit tolling to state proceedings, "it knew how to do so." *Custis* v. *United States*, 511 U. S. 485, 492 (1994). In the special tolling provision governing certain capital cases, Congress said explicitly that the limitations period is tolled "from the date on which the first petition for post-conviction review or other collateral relief is filed *until the final State court disposition of such petition*," thus making it clear that federal proceedings, for example, petitions for certiorari, do not count. 28 U. S. C. § 2263(b)(2) (1994 ed., Supp. V) (emphasis added). Does Congress' failure to include a similar qualification in § 2244's tolling provision show that it means that provision to cover both federal and state proceedings? In fact, the "argument from neighbors" shows only that Congress might have spoken more clearly than it did. It cannot prove the statutory point.

The majority also believes that only its interpretation gives effect to every word in the statute—in particular the word "State." It asks: If Congress meant to cover federal habeas review, why does the word "State" appear in the statute? Federal habeas proceedings are a form of post-conviction proceedings. So, had Congress meant to cover them, it would have just said "post-conviction and other collateral review." See *ante*, at 174.

But this argument proves too much, for one can ask with equal force: If Congress intended to exclude federal habeas proceedings, why does the word "post-conviction" appear in the statute? State postconviction proceedings are a form of collateral review. So, had Congress meant to exclude federal collateral proceedings, it could have just said "State col-

lateral review," thereby clearly indicating that the phrase applies only to state proceedings.

In fact, this kind of argument, viewed realistically, gets us nowhere. Congress probably picked out "State post-conviction" proceedings from the universe of collateral proceedings and mentioned it separately because state post-conviction proceedings are a salient example of collateral proceedings. But to understand this is not to understand whether the universe from which Congress picked "State post-conviction" proceedings as an example is the universe of *all* collateral proceedings, or the universe of *state* collateral proceedings. The statute simply does not say.

Indeed, the majority recognizes that neither the statute's language nor the application of canons of construction is sufficient to resolve the problem. It concedes that the phrase "other collateral review," if construed as "other [state] collateral review," would add little to the coverage that the words "State post-conviction . . . review" would provide in its absence. See *ante*, at 176 (noting that a state criminal conviction is "by far the most common" basis for seeking federal habeas review). The majority resolves this difficulty by noting that "other collateral review" could also include either review of state civil confinement proceedings or state postconviction review to which a State refers by some other name, such as state "habeas" proceedings. See *ante*, at 176–177.

But it is difficult to believe that Congress had state civil proceedings in mind, given that other provisions within § 2244 indicate that Congress saw criminal proceedings as its basic subject matter. For instance, the exceptions to the bar against successive petitions in § 2244(d) seem to presume that the petition at issue challenges a criminal conviction. See 28 U. S. C. § 2244(b)(2)(A) (1994 ed., Supp. V) (requiring a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court"); § 2244(b)(2)(B) (requiring new evidence establishing that,

"but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense"). Nor does it seem likely that Congress would have expected federal courts applying the tolling provision to construe "post-conviction" review to exclude state "habeas" petitions challenging convictions. The statute in which the words "State post-conviction proceedings" appear is a *federal* statute, and federal courts would be likely to apply those words to whatever state proceedings in fact fall within this federal description, whatever different labels different States might choose to attach. It is simpler, more meaningful, and just as logical to assume that Congress meant the words "other collateral review" to cast a wider net—a net wide enough to include federal collateral proceedings such as those that precede a dismissal for nonexhaustion.

Faced with this statutory ambiguity, I would look to statutory purposes in order to reach a proper interpretation. And, while I agree that Congress sought to "'further the principles of comity, finality, and federalism,'" *ante*, at 178 (quoting *Williams* v. *Taylor*, 529 U. S. 420, 436 (2000)), I would also ask whether Congress would have intended to create the kind of "unexhausted petition" problem that I described at the outset. The answer is no. Congress enacted a statute that all agree gave state prisoners a full year (plus the duration of state collateral proceedings) to file a federal habeas corpus petition. Congress would not have intended to shorten that time dramatically, at random, and perhaps erase it altogether, "den[ying] the petitioner the protections of the Great Writ entirely," *Lonchar* v. *Thomas*, 517 U. S. 314, 324 (1996), simply because the technical nature of the habeas rules led a prisoner initially to file a petition in the wrong court.

The majority's argument assumes a congressional desire to strengthen the prisoners' incentive to file in state court first. But that is not likely to be the result of today's holding. After all, virtually every state prisoner already

knows that he must first exhaust state-court remedies; and I imagine that virtually all of them now try to do so. The problem arises because the vast majority of federal habeas petitions are brought without legal representation. See Federal Habeas Corpus Review 14 (finding that 93% of habeas petitioners in study were *pro se*). Prisoners acting *pro se* will often not know whether a change in wording between state and federal petitions will be seen in federal court as a new claim or a better way of stating an old one; and they often will not understand whether new facts brought forward in the federal petition reflect a new claim or better support for an old one. Insofar as that is so, the Court's approach is likely to lead not to fewer improper federal petitions, but to increased confusion, as prisoners hesitate to change the language of state petitions or add facts, and to greater unfairness. And it will undercut one significant purpose of the provision before us—to grant state prisoners a fair and reasonable time to bring a first federal habeas corpus petition.

Nor is it likely that prisoners will deliberately seek to delay by repeatedly filing unexhausted petitions in federal court, as the Court suggests. See *ante*, at 180. First, prisoners not under a sentence of death (the vast majority of habeas petitioners) have no incentive to delay adjudication of their claims. Rather, "[t]he prisoner's principal interest . . . is in obtaining speedy federal relief." *Rose* v. *Lundy*, 455 U. S., at 520. Second, the prisoner who chooses to go into federal court with unexhausted claims runs the risk that the district court will simply deny those claims on the merits, as it is permitted to do, see 28 U. S. C. § 2254(b)(2) (1994 ed., Supp. V), before the prisoner has had the opportunity to develop a record in state court. Third, district courts have the power to prevent vexatious repeated filings by, for instance, ordering that a petition filed after a mixed petition is dismissed must contain only exhausted claims. See *Slack* v. *McDaniel*, 529 U. S. 473, 489 (2000). Thus,

the interest in reducing "piecemeal litigation," *ante*, at 180, is not likely to be significantly furthered by the majority's holding.

Finally, the majority's construction of the statute will not necessarily promote comity. Federal courts, understanding that dismissal for nonexhaustion may mean the loss of any opportunity for federal habeas review, may tend to read ambiguous earlier state-court proceedings as having adequately exhausted a federal petition's current claims. For similar reasons, wherever possible, they may reach the merits of a federal petition's claims without sending the petitioner back to state court for exhaustion. To that extent, the majority's interpretation will result in a lesser, not a greater, respect for the state interests to which the majority refers. In addition, by creating pressure to expedite consideration of habeas petitions and to reach the merits of arguably exhausted claims, it will impose a heavier burden on the district courts. (While JUSTICE STEVENS' sound suggestions that district courts hold mixed petitions in abeyance and employ equitable tolling, see *ante*, at 182–184 (opinion concurring in part and concurring in judgment), would properly ameliorate some of the unfairness of the majority's interpretation, they will also add to the burdens on the district courts in a way that simple tolling for federal habeas petitions would not.)

In two recent cases, we have assumed that Congress did not want to deprive state prisoners of first federal habeas corpus review, and we have interpreted statutory ambiguities accordingly. In *Stewart* v. *Martinez-Villareal*, 523 U. S. 637 (1998), we held that a federal habeas petition filed after the initial filing was dismissed as premature should not be deemed a "second or successive" petition barred by § 2244, lest "dismissal . . . for technical procedural reasons . . . bar the prisoner from ever obtaining federal habeas review." *Id.*, at 645. And in *Slack* v. *McDaniel*, we held that a federal habeas petition filed after dismissal of an initial filing for nonexhaustion should not be deemed a "second

or successive petition," lest "the complete exhaustion rule" become a "'trap'" for "'the unwary *pro se* prisoner.'" 529 U. S., at 487 (quoting *Rose*, *supra*, at 520). Making the same assumption here, I would interpret the ambiguous provision before us to permit tolling for federal habeas petitions.

In both *Martinez-Villareal* and *Slack*, the Court discerned the purpose of an ambiguous statutory provision by assuming that (absent a contrary indication) congressional purpose would mirror that of most reasonable human beings knowledgeable about the area of the law in question. And the Court kept those purposes firmly and foremost in mind as it sought to understand the statute. See *Slack*, *supra*, at 486–487; *Martinez-Villareal*, *supra*, at 644 (refusing to adopt an interpretation whose "implications for habeas practice would be far reaching and seemingly perverse"). Today it takes a different approach—an approach that looks primarily, though not exclusively, to linguistic canons to dispel the uncertainties caused by ambiguity. Where statutory language is ambiguous, I believe these priorities are misplaced. Language, dictionaries, and canons, unilluminated by purpose, can lead courts into blind alleys, producing rigid interpretations that can harm those whom the statute affects. If generalized, the approach, bit by bit, will divorce law from the needs, lives, and values of those whom it is meant to serve—a most unfortunate result for a people who live their lives by law's light. The Court was right in *Martinez-Villareal* and *Slack* to see purpose as key to the statute's meaning and to understand Congress as intending the same; it is wrong to reverse its interpretive priorities here.

With respect, I dissent.

Syllabus

SAUCIER *v.* KATZ ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 99–1977. Argued March 20, 2001—Decided June 18, 2001

Respondent Katz, president of respondent In Defense of Animals, filed a suit pursuant to *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, against, *inter alios*, petitioner Saucier, a military policeman. Katz alleged, among other things, that Saucier had violated his Fourth Amendment rights by using excessive force in arresting him while he protested during Vice President Gore's speech at a San Francisco army base. The District Court declined to grant Saucier summary judgment on qualified immunity grounds. In affirming, the Ninth Circuit made a two-part qualified immunity inquiry. First, it found that the law governing Saucier's conduct was clearly established when the incident occurred. It therefore moved to a second step: to determine if a reasonable officer could have believed, in light of the clearly established law, that his conduct was lawful. The court concluded that this step and the merits of a Fourth Amendment excessive force claim are identical, since both concern the objective reasonableness of the officer's conduct in light of the circumstances the officer faced at the scene. Thus, it found, summary judgment based on qualified immunity was inappropriate.

Held:

1. A qualified immunity ruling requires an analysis not susceptible of fusion with the question whether unreasonable force was used in making the arrest. The Ninth Circuit's approach cannot be reconciled with *Anderson* v. *Creighton*, 483 U. S. 635. A qualified immunity defense must be considered in proper sequence. A ruling should be made early in the proceedings so that the cost and expenses of trial are avoided where the defense is dispositive. Such immunity is an entitlement not to stand trial, not a defense from liability. *Mitchell* v. *Forsyth*, 472 U. S. 511, 526. The initial inquiry is whether a constitutional right would have been violated on the facts alleged, for if no right would have been violated, there is no need for further inquiry into immunity. However, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is whether the right was clearly established. This inquiry must be undertaken in light of the case's specific context, not as a broad general proposition. The relevant, dispositive inquiry is whether it would be clear to a rea-

sonable officer that the conduct was unlawful in the situation he confronted. See *Wilson* v. *Layne*, 526 U. S. 603, 615. The Ninth Circuit's approach—to deny summary judgment if a material issue of fact remains on the excessive force claim—could undermine the goal of qualified immunity to avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. *Harlow* v. *Fitzgerald*, 457 U. S. 800, 818. If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate. The Ninth Circuit concluded that qualified immunity is duplicative in an excessive force case, thus eliminating the need for the second step. In holding that qualified immunity applied in the Fourth Amendment context just as it would for any other official misconduct claim, the *Anderson* Court rejected the argument that there is no distinction between the reasonableness standard for warrantless searches and the qualified immunity inquiry. In an attempt to distinguish *Anderson*, Katz claims that the subsequent *Graham* v. *Connor*, 490 U. S. 386, decision set forth an excessive force analysis indistinguishable from qualified immunity, thus rendering the separate immunity inquiry superfluous and inappropriate in such cases. Contrary to his arguments, the immunity and excessive force inquiries remain distinct after *Graham*. *Graham* sets forth factors relevant to the merits of a constitutional excessive force claim, which include the severity of the crime, whether the suspect poses a threat to the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. *Id.*, at 396. If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed. The qualified immunity inquiry's concern, on the other hand, is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. An officer might correctly perceive all of the relevant facts, but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. Pp. 200–207.

2. Petitioner was entitled to qualified immunity. Assuming that a constitutional violation occurred under the facts alleged, the question is whether this general prohibition was the source for clearly established law that was contravened in the circumstances. In the circumstances presented to petitioner, which included the duty to protect the Vice President's safety and security from persons unknown in number, there was no clearly established rule prohibiting him from acting as he did. This conclusion is confirmed by the uncontested fact that the force used—dragging Katz from the area and shoving him while placing

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him into a van—was not so excessive that Katz suffered hurt or injury. Pp. 207–209.

194 F. 3d 962, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and THOMAS, JJ., joined, and in which SOUTER, J., joined as to Parts I and II. GINSBURG, J., filed an opinion concurring in the judgment, in which STEVENS and BREYER, JJ., joined, *post*, p. 209. SOUTER, J., filed an opinion concurring in part and dissenting in part, *post*, p. 217.

Deputy Solicitor General Clement argued the cause for petitioner. On the briefs were former *Solicitor General Waxman, Acting Solicitor General Underwood, Assistant Attorney General Ogden, Jeffrey A. Lamken, Barbara L. Herwig,* and *Edward Himmelfarb.*

J. Kirk Boyd argued the cause for respondents. With him on the brief was *David H. Williams.**

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*Briefs of *amici curiae* urging reversal were filed for the State of Texas et al. by *John Cornyn*, Attorney General of Texas, *Andy Taylor*, First Assistant Attorney General, *Gregory S. Coleman*, Solicitor General, and *Lisa R. Eskow*, Assistant Solicitor General, joined by the Attorneys General for their respective States as follows: *Bill Pryor* of Alabama, *Bruce M. Botelho* of Alaska, *Mark Pryor* of Arkansas, *Bill Lockyer* of California, *Ken Salazar* of Colorado, *Richard Blumenthal* of Connecticut, *M. Jane Brady* of Delaware, *James E. Ryan* of Illinois, *Richard P. Ieyoub* of Louisiana, *J. Joseph Curran, Jr.*, of Maryland, *Thomas F. Reilly* of Massachusetts, *Mike Moore* of Mississippi, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Eliot Spitzer* of New York, *Heidi Heitkamp* of North Dakota, *Betty D. Montgomery* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *D. Michael Fisher* of Pennsylvania, *Charles M. Condon* of South Carolina, *Mark Barnett* of South Dakota, *Paul G. Summers* of Tennessee, *Jan Graham* of Utah, *William H. Sorrell* of Vermont, and *Christine O. Gregoire* of Washington; for the Grand Lodge of the Fraternal Order of Police by *Tom Rutherford;* and for the National Association of Police Organizations et al. by *Stephen R. McSpadden.*

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *David Rudovsky, Michael Avery, Ruth E. Harlow, Steven R. Shapiro,* and *Alan L. Schlosser;* and for the Association of the Bar of the City of New York by *Leon Friedman* and *Ronald J. Tabak.*

JUSTICE KENNEDY delivered the opinion of the Court.

In this case a citizen alleged excessive force was used to arrest him. The arresting officer asserted the defense of qualified immunity. The matter we address is whether the requisite analysis to determine qualified immunity is so intertwined with the question whether the officer used excessive force in making the arrest that qualified immunity and constitutional violation issues should be treated as one question, to be decided by the trier of fact. The Court of Appeals held the inquiries do merge into a single question. We now reverse and hold that the ruling on qualified immunity requires an analysis not susceptible of fusion with the question whether unreasonable force was used in making the arrest.

I

In autumn of 1994, the Presidio Army Base in San Francisco was the site of an event to celebrate conversion of the base to a national park. Among the speakers was Vice President Albert Gore, Jr., who attracted several hundred observers from the military and the general public. Some in attendance were not on hand to celebrate, however. Respondent Elliot Katz was concerned that the Army's Letterman Hospital would be used for conducting experiments on animals. (Katz was president of a group called In Defense of Animals. Although both he and the group are respondents here, the issues we discuss center upon Katz, and we refer to him as "respondent.") To voice opposition to the possibility that the hospital might be used for experiments, respondent brought with him a cloth banner, approximately 4 by 3 feet, that read "Please Keep Animal Torture Out of Our National Parks." In the past, as respondent was aware, members of the public had been asked to leave the military base when they engaged in certain activities, such as distributing handbills; and he kept the banner concealed under his jacket as he walked through the base.

The area designated for the speakers contained seating for the general public, separated from the stage by a waist-high fence. Respondent sat in the front row of the public seating area. At about the time Vice President Gore began speaking, respondent removed the banner from his jacket, started to unfold it, and walked toward the fence and speakers' platform.

Petitioner Donald Saucier is a military police officer who was on duty that day. He had been warned by his superiors of the possibility of demonstrations, and respondent had been identified as a potential protester. Petitioner and Sergeant Steven Parker—also a military police officer, but not a party to the suit—recognized respondent and moved to intercept him as he walked toward the fence. As he reached the barrier and began placing the banner on the other side, the officers grabbed respondent from behind, took the banner, and rushed him out of the area. Each officer had one of respondent's arms, half-walking, half-dragging him, with his feet "barely touching the ground." App. 24. Respondent was wearing a visible, knee-high leg brace, although petitioner later testified he did not remember noticing it at the time. Saucier and Parker took respondent to a nearby military van, where, respondent claims, he was shoved or thrown inside. *Id.*, at 25. The reason for the shove remains unclear. It seems agreed that respondent placed his feet somewhere on the outside of the van, perhaps the bumper, but there is a dispute whether he did so to resist. As a result of the shove, respondent claims, he fell to the floor of the van, where he caught himself just in time to avoid any injury. The officers drove respondent to a military police station, held him for a brief time, and then released him. Though the details are not clear, it appears that at least one other protester was also placed into the van and detained for a brief time. *Id.*, at 27.

Respondent brought this action in the United States District Court for the Northern District of California against

petitioner and other officials pursuant to *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), alleging, *inter alia*, that defendants had violated respondent's Fourth Amendment rights by using excessive force to arrest him. The District Court granted the defendants' motions for summary judgment on the grounds of qualified immunity on all claims other than the excessive force claim against Saucier. It held a dispute on a material fact existed concerning whether excessive force was used to remove respondent from the crowd and place him into the van. App. to Pet. for Cert. 27a. The District Court held that the law governing excessive force claims was clearly established at the time of the arrest, and that "[i]n the Fourth Amendment context, the qualified immunity inquiry is the same as the inquiry made on the merits." *Id.*, at 29a–30a. As a result, it ruled, petitioner was not entitled to summary judgment. *Id.*, at 30a.

In the United States Court of Appeals for the Ninth Circuit petitioner filed an interlocutory appeal from the denial of qualified immunity. 194 F. 3d 962 (1999). The Court of Appeals affirmed, noting at the outset its two-part analysis for qualified immunity questions. First, the Court of Appeals considers "whether the law governing the official's conduct was clearly established." *Id.*, at 967. If it was not, that ends the matter, and the official is entitled to immunity. If, however, the law was clearly established when the conduct occurred, the Court of Appeals' second step is to determine if a reasonable officer could have believed, in light of the clearly established law, that his conduct was lawful. *Ibid.* As to the first step of its analysis, the court observed that *Graham* v. *Connor*, 490 U. S. 386 (1989), sets forth the objective reasonableness test for evaluating excessive force claims, a principle the Court of Appeals concluded was clearly established for qualified immunity purposes. The court then concluded that the second step of the qualified immunity inquiry and the merits of the Fourth

Amendment excessive force claim are identical, since both concern the objective reasonableness of the officer's conduct in light of the circumstances the officer faced on the scene. 194 F. 3d, at 968. On this reasoning, summary judgment based on qualified immunity was held inappropriate. *Id.*, at 968–969.

Saucier, represented by the Government of the United States, sought review here, arguing the Court of Appeals erred in its view that the qualified immunity inquiry is the same as the constitutional inquiry and so becomes superfluous or duplicative when excessive force is alleged. We granted certiorari, 531 U. S. 991 (2000).

II

The Court of Appeals ruled first that the right was clearly established; and second that the reasonableness inquiry into excessive force meant that it need not consider aspects of qualified immunity, leaving the whole matter to the jury. 194 F. 3d, at 967. This approach cannot be reconciled with *Anderson* v. *Creighton*, 483 U. S. 635 (1987), however, and was in error in two respects. As we shall explain, the first inquiry must be whether a constitutional right would have been violated on the facts alleged; second, assuming the violation is established, the question whether the right was clearly established must be considered on a more specific level than recognized by the Court of Appeals.

In a suit against an officer for an alleged violation of a constitutional right, the requisites of a qualified immunity defense must be considered in proper sequence. Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive. Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." *Mitchell* v. *Forsyth*, 472 U. S. 511, 526 (1985). The privilege is "an *immunity from suit* rather than a mere defense to lia-

bility; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Ibid.* As a result, "we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter* v. *Bryant*, 502 U. S. 224, 227 (1991) *(per curiam)*.

A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry. *Siegert* v. *Gilley*, 500 U. S. 226, 232 (1991). In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.

If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established. This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition; and it too serves to advance understanding of the law and to allow officers to avoid the burden of trial if qualified immunity is applicable.

In this litigation, for instance, there is no doubt that *Graham* v. *Connor*, *supra*, clearly establishes the general

proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness. Yet that is not enough. Rather, we emphasized in *Anderson* "that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." 483 U. S., at 640. The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. See *Wilson* v. *Layne*, 526 U. S. 603, 615 (1999) ("[A]s we explained in *Anderson*, the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established").

The approach the Court of Appeals adopted—to deny summary judgment any time a material issue of fact remains on the excessive force claim—could undermine the goal of qualified immunity to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Harlow* v. *Fitzgerald*, 457 U. S. 800, 818 (1982). If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate. See *Malley* v. *Briggs*, 475 U. S. 335, 341 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law").

This is not to say that the formulation of a general rule is beside the point, nor is it to insist the courts must have agreed upon the precise formulation of the standard. Assuming, for instance, that various courts have agreed that certain conduct is a constitutional violation under facts not distinguishable in a fair way from the facts presented in the case at hand, the officer would not be entitled to qualified immunity based simply on the argument that courts

had not agreed on one verbal formulation of the controlling standard.

The Court of Appeals concluded that qualified immunity is merely duplicative in an excessive force case, eliminating the need for the second step where a constitutional violation could be found based on the allegations. In *Anderson*, a warrantless search case, we rejected the argument that there is no distinction between the reasonableness standard for warrantless searches and the qualified immunity inquiry. We acknowledged there was some "surface appeal" to the argument that, because the Fourth Amendment's guarantee was a right to be free from "unreasonable" searches and seizures, it would be inconsistent to conclude that an officer who acted unreasonably under the constitutional standard nevertheless was entitled to immunity because he "'reasonably' acted unreasonably." 483 U. S., at 643. This superficial similarity, however, could not overcome either our history of applying qualified immunity analysis to Fourth Amendment claims against officers or the justifications for applying the doctrine in an area where officers perform their duties with considerable uncertainty as to "whether particular searches or seizures comport with the Fourth Amendment." *Id.*, at 644. With respect, moreover, to the argument made in *Anderson* that an exception should be made for Fourth Amendment cases, we observed "the heavy burden this argument must sustain to be successful," since "the doctrine of qualified immunity reflects a balance that has been struck 'across the board.'" *Id.*, at 642 (quoting *Harlow* v. *Fitzgerald*, *supra*, at 821). We held that qualified immunity applied in the Fourth Amendment context just as it would for any other claim of official misconduct. 483 U. S., at 644.

Faced, then, with the heavy burden of distinguishing *Anderson* and of carving out an exception to the typical qualified immunity analysis applied in other Fourth Amendment contexts, the primary submission by respondent in defense

of the Court of Appeals' decision is that our decision in *Graham* v. *Connor*, 490 U. S. 386 (1989), somehow changes matters. *Graham*, in respondent's view, sets forth an excessive force analysis indistinguishable from qualified immunity, rendering the separate immunity inquiry superfluous and inappropriate. Respondent asserts that, like the qualified immunity analysis applicable in other contexts, the excessive force test already affords officers latitude for mistaken beliefs as to the amount of force necessary, so that "*Graham* has addressed for the excessive force area most of the concerns expressed in *Anderson*." Brief for Respondents 7. Respondent points out that *Graham* did not address the interaction of excessive force claims and qualified immunity, since the issue was not raised, see 490 U. S., at 399, n. 12; and respondent seeks to distinguish *Anderson* on the theory that the issue of probable cause implicates evolving legal standards and resulting legal uncertainty, a subject raising recurrent questions of qualified immunity. By contrast, respondent says, excessive force is governed by the standard established in *Graham*, a standard providing ample guidance for particular situations. Finally, respondent adopts the suggestion made by one Court of Appeals that the relevant distinction is that probable cause is an *ex post* inquiry, whereas excessive force, like qualified immunity, should be evaluated from an *ex ante* perspective. See *Finnegan* v. *Fountain*, 915 F. 2d 817, 824, n. 11 (CA2 1990).

These arguments or attempted distinctions cannot bear the weight respondent seeks to place upon them. *Graham* did not change the qualified immunity framework explained in *Anderson*. The inquiries for qualified immunity and excessive force remain distinct, even after *Graham*.

In *Graham*, we held that claims of excessive force in the context of arrests or investigatory stops should be analyzed under the Fourth Amendment's "objective reasonableness standard," not under substantive due process principles.

490 U. S., at 388, 394. Because "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation," *id.*, at 397, the reasonableness of the officer's belief as to the appropriate level of force should be judged from that on-scene perspective, *id.*, at 396. We set out a test that cautioned against the "20/20 vision of hindsight" in favor of deference to the judgment of reasonable officers on the scene. *Id.*, at 393, 396. *Graham* sets forth a list of factors relevant to the merits of the constitutional excessive force claim, "requir[ing] careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.*, at 396. If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed.

The qualified immunity inquiry, on the other hand, has a further dimension. The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.

Graham does not always give a clear answer as to whether a particular application of force will be deemed excessive by the courts. This is the nature of a test which must accommodate limitless factual circumstances. This reality serves

to refute respondent's claimed distinction between excessive force and other Fourth Amendment contexts; in both spheres the law must be elaborated from case to case. Qualified immunity operates in this case, then, just as it does in others, to protect officers from the sometimes "hazy border between excessive and acceptable force," *Priester* v. *Riviera Beach*, 208 F. 3d 919, 926–927 (CA11 2000), and to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.

Graham and *Anderson* refute the excessive force/probable cause distinction on which much of respondent's position seems to depend. The deference owed officers facing suits for alleged excessive force is not different in some qualitative respect from the probable-cause inquiry in *Anderson*. Officers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause or exigent circumstances, for example, and in those situations courts will not hold that they have violated the Constitution. Yet, even if a court were to hold that the officer violated the Fourth Amendment by conducting an unreasonable, warrantless search, *Anderson* still operates to grant officers immunity for reasonable mistakes as to the legality of their actions. The same analysis is applicable in excessive force cases, where in addition to the deference officers receive on the underlying constitutional claim, qualified immunity can apply in the event the mistaken belief was reasonable.

The temporal perspective of the inquiry, whether labeled as *ex ante* or *ex post*, offers no meaningful distinction between excessive force and other Fourth Amendment suits. *Graham* recognized as much, reviewing several of our probable-cause and search warrant cases, then stating that "[w]ith respect to a claim of excessive force, the same standard of reasonableness at the moment applies." 490 U. S., at 396 (discussing use of force under *Terry* v. *Ohio*, 392 U. S. 1 (1968); probable cause to arrest under *Hill* v. *California*, 401 U. S. 797 (1971); and search warrant requirements under

Maryland v. *Garrison*, 480 U. S. 79 (1987)); see also *Hunter* v. *Bryant*, 502 U. S., at 228 ("Probable cause existed if 'at the moment the arrest was made . . . the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing'" a crime had been committed (quoting *Beck* v. *Ohio*, 379 U. S. 89, 91 (1964))). Excessive force claims, like most other Fourth Amendment issues, are evaluated for objective reasonableness based upon the information the officers had when the conduct occurred.

III

The case was presented to the Court of Appeals on the assumption that respondent's seizure and brief detention did not violate clearly established First Amendment privileges and did not violate the Fourth Amendment right to be free from arrest without probable cause, as distinct from the force used to detain. The sole question, then, is whether the force used violated a clearly established Fourth Amendment protection so that petitioner was not entitled to immunity.

Our instruction to the district courts and courts of appeals to concentrate at the outset on the definition of the constitutional right and to determine whether, on the facts alleged, a constitutional violation could be found is important. As we have said, the procedure permits courts in appropriate cases to elaborate the constitutional right with greater degrees of specificity. Because we granted certiorari only to determine whether qualified immunity was appropriate, however, and because of the limits imposed upon us by the questions on which we granted review, we will assume a constitutional violation could have occurred under the facts alleged based simply on the general rule prohibiting excessive force, then proceed to the question whether this general prohibition against excessive force was the source for clearly established law that was contravened

in the circumstances this officer faced. There was no contravention under this standard. Though it is doubtful that the force used was excessive, we need not rest our conclusion on that determination. The question is what the officer reasonably understood his powers and responsibilities to be, when he acted, under clearly established standards.

Respondent's excessive force claim for the most part depends upon the "gratuitously violent shove" allegedly received when he was placed into the van, although respondent notes as well that the alleged violation resulted from the "totality of the circumstances," including the way he was removed from the speaking area. See Brief for Respondents 3, n. 2.

These circumstances, however, disclose substantial grounds for the officer to have concluded he had legitimate justification under the law for acting as he did. In *Graham* we noted that "[o]ur Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." 490 U. S., at 396. A reasonable officer in petitioner's position could have believed that hurrying respondent away from the scene, where the Vice President was speaking and respondent had just approached the fence designed to separate the public from the speakers, was within the bounds of appropriate police responses.

Petitioner did not know the full extent of the threat respondent posed or how many other persons there might be who, in concert with respondent, posed a threat to the security of the Vice President. There were other potential protesters in the crowd, and at least one other individual was arrested and placed into the van with respondent. In carrying out the detention, as it has been assumed the officers had the right to do, petitioner was required to recognize the necessity to protect the Vice President by securing respondent and restoring order to the scene. It cannot be said

there was a clearly established rule that would prohibit using the force petitioner did to place respondent into the van to accomplish these objectives.

As for the shove respondent received when he was placed into the van, those same circumstances show some degree of urgency. We have approved the observation that "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment." *Ibid.* (citations omitted). Pushes and shoves, like other police conduct, must be judged under the Fourth Amendment standard of reasonableness.

In the circumstances presented to this officer, which included the duty to protect the safety and security of the Vice President of the United States from persons unknown in number, neither respondent nor the Court of Appeals has identified any case demonstrating a clearly established rule prohibiting the officer from acting as he did, nor are we aware of any such rule. Our conclusion is confirmed by the uncontested fact that the force was not so excessive that respondent suffered hurt or injury. On these premises, petitioner was entitled to qualified immunity, and the suit should have been dismissed at an early stage in the proceedings.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE GINSBURG, with whom JUSTICE STEVENS and JUSTICE BREYER join, concurring in the judgment.

In *Graham* v. *Connor*, 490 U. S. 386 (1989), the Court announced and described an "objective reasonableness" standard to govern all claims that law enforcement officers, in violation of the Fourth Amendment, used excessive force in the course of an arrest. Measuring material facts of this case that are not subject to genuine dispute against the *Graham*

standard, I conclude that officer Saucier's motion for summary judgment should have been granted. I therefore concur in the Court's judgment. However, I would not travel the complex route the Court lays out for lower courts.

Application of the *Graham* objective reasonableness standard is both necessary, under currently governing precedent, and, in my view, sufficient to resolve cases of this genre. The Court today tacks on to a *Graham* inquiry a second, overlapping objective reasonableness inquiry purportedly demanded by qualified immunity doctrine. The two-part test today's decision imposes holds large potential to confuse. Endeavors to bring the Court's abstract instructions down to earth, I suspect, will bear out what lower courts have already observed—paradigmatically, the determination of police misconduct in excessive force cases and the availability of qualified immunity both hinge on the same question: Taking into account the particular circumstances confronting the defendant officer, could a reasonable officer, identically situated, have believed the force employed was lawful? See, *e. g.*, *Roy* v. *Inhabitants of Lewiston*, 42 F. 3d 691, 695 (CA1 1994); *Rowland* v. *Perry*, 41 F. 3d 167, 173 (CA4 1994). Nothing more and nothing else need be answered in this case.

I

All claims that law enforcement officers have used excessive force in the course of an arrest, *Graham* made explicit, are to be judged "under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." 490 U. S., at 395. Underlying intent or motive are not relevant to the inquiry; rather, "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." *Id.*, at 397. The proper perspective in judging an excessive force claim, *Graham* explained, is that of "a reasonable officer on the scene" and "at the moment" force was employed. *Id.*, at 396. "Not every push or shove," the

Court cautioned, "even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment." *Ibid.* (citation omitted). "The calculus of reasonableness" must allow for the reality that "police officers are often forced to make split-second judgments" about the force a particular situation warrants "in circumstances that are tense, uncertain, and rapidly evolving." *Id.*, at 396–397.

Under *Graham*'s instructions, the question in this case is whether officer Saucier, in light of the facts and circumstances confronting him, could have reasonably believed he acted lawfully. Here, as in the mine run of excessive force cases, no inquiry more complex than that is warranted.

Inspecting this case under *Graham*'s lens, and without doubling the "objectively reasonable" inquiry, I agree that Katz's submissions were too slim to put officer Saucier to the burden of trial. As the Court points out, it is not genuinely in doubt that "[a] reasonable officer in [Saucier's] position could have believed that hurrying [Katz] away from the scene . . . was within the bounds of appropriate police responses." *Ante*, at 208. Katz's excessive force claim thus depended on the "gratuitously violent shove" he allegedly received. *Ibid.*; see Brief for Respondents 3, n. 2 (conceding that "the gratuitous violent shove" was essential to Katz's excessive force claim).

Yet Katz failed to proffer proof, after pretrial discovery, that Saucier, as distinguished from his fellow officer Parker,[1] had a hand in the allegedly violent shove.[2] Saucier, in his

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[1] Though named as a defendant, Parker was never served with the complaint, and therefore did not become a party to this litigation. See Brief for Petitioner 3, n. 4.

[2] See Fed. Rule Civ. Proc. 56(e) ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial.").

deposition, denied participating in any shove, see App. 39–40, while Katz, in his deposition, said, without elaborating: "They [Parker and Saucier] pretty much threw me in. Just shoved me in," *id.*, at 25. But critically, at no point did Katz say, specifically, that Saucier himself, and not only Parker, pushed or shoved.

Katz's reluctance directly to charge Saucier with pushing or shoving is understandable in view of a television news videotape of the episode Katz presented as an exhibit to his complaint. See App. to Pet. for Cert. 27a. The videotape shows that the shove, described by Katz as gratuitously violent, came from the officer on the right side of the police van, not from the officer positioned on the left side. It is undisputed that the officer on the right is Parker, the officer on the left, Saucier. See Pet. for Cert. 27–28, and n. 19; Brief for Petitioner 50, n. 26. Mindful of *Graham*'s cautionary observation that "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment," 490 U. S., at 396 (citation omitted), and in view of Katz's failure to deny that the shove alleged to establish excessive force came from Parker alone, not from Saucier, I am persuaded that Katz tendered no triable excessive force claim against Saucier.[3]

II

In the Court's opinion, *Graham* is inadequate to control adjudication of excessive force cases. *Graham* must be overlaid, the Court maintains, by a sequential qualified immunity inquiry. *Ante*, at 200. The Court instructs lower courts first to undertake what appears to be an unadorned

[3] As the Court observes, there is a dispute whether Katz was resisting arrest at the time he was placed in the van. *Ante*, at 198. That dispute is irrelevant, however, in view of the absence of any indication that Saucier employed excessive force in removing Katz from the site of the celebration and placing him in the van. See *Rowland* v. *Perry*, 41 F. 3d 167, 174 (CA4 1994) ("[d]isputed versions of the facts alone are not enough to warrant denial of summary judgment").

Graham inquiry, *i. e.*, to consider initially whether the parties' submissions, viewed favorably to the plaintiff, could show that the officer's conduct violated the Fourth Amendment. *Ante*, at 201. If the plaintiff prevails on that "threshold question," *ibid.*, the trial court is then to proceed to the "dispositive [qualified immunity] inquiry," asking "whether it would be clear to a reasonable officer that the conduct was unlawful in the situation he confronted," *ante*, at 202.[4]

In the instant case, however, the Court finds that procedural impediments stop it from considering first "whether a constitutional right would have been violated on the facts alleged." *Ante*, at 200, 207–208. The Court therefore "assume[s] a constitutional violation could have occurred," *ante*, at 207—*i. e.*, it supposes a trier could have found that officer Saucier used force excessive under *Graham*'s definition. Even so, the Court reasons, qualified immunity would shield Saucier because he could have "concluded he had legitimate justification under the law for acting as he did." *Ante*, at 208.

Skipping ahead of the basic *Graham* (constitutional violation) inquiry it admonished lower courts to undertake at the outset, the Court failed to home in on the duplication inherent in its two-step scheme. As lower courts dealing with excessive force cases on the ground have recognized, however, this Court's decisions invoke "the same 'objectively reasonable' standard in describing both the constitutional test of liability [citing *Graham*, 490 U. S., at 397], and the . . . standard for qualified immunity [citing *Anderson* v. *Creighton*, 483 U. S. 635, 639 (1987)]." *Roy*, 42 F. 3d, at

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[4] The Court's observation that "neither respondent nor the Court of Appeals ha[s] identified any case demonstrating a clearly established rule prohibiting the officer from acting as he did," *ante*, at 209, must be read in light of our previous caution that "the very action in question [need not have] previously been held unlawful" for a plaintiff to defeat qualified immunity, *Anderson* v. *Creighton*, 483 U. S. 635, 640 (1987).

695; see *Street* v. *Parham*, 929 F. 2d 537, 540 (CA10 1991) (describing excessive force case as one "where the determination of liability and the availability of qualified immunity depend on the same findings"). In other words, an officer who uses force that is objectively reasonable "in light of the facts and circumstances confronting [him]," *Graham*, 490 U. S., at 397, simultaneously meets the standard for qualified immunity, see *ante*, at 201, and the standard the Court set in *Graham* for a decision on the merits in his favor. Conversely, an officer whose conduct is objectively unreasonable under *Graham* should find no shelter under a sequential qualified immunity test.

Double counting "objective reasonableness," the Court appears to suggest, *ante*, at 200, is demanded by *Anderson*, which twice restated that qualified immunity shields the conduct of officialdom "across the board." 483 U. S., at 642, 645 (quoting *Harlow* v. *Fitzgerald*, 457 U. S. 800, 821 (1982) (Brennan, J., concurring)); see also *Anderson*, 483 U. S., at 643 ("we have been unwilling to complicate qualified immunity analysis by making the scope or extent of immunity turn on the precise nature of various officials' duties or the precise character of the particular rights alleged to have been violated"). As I see it, however, excessive force cases are not meet for *Anderson*'s two-part test.

Anderson presented the question whether the particular search conducted without a warrant was supported by probable cause and exigent circumstances. The answer to such a question is often far from clear.[5] Law in the area is constantly evolving and, correspondingly, variously interpreted. As aptly observed by the Second Circuit, "even learned and experienced jurists have had difficulty in de-

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[5] *Wilson* v. *Layne*, 526 U. S. 603 (1999), is a prototypical case. There, the Court accorded qualified immunity to police who permitted the media to accompany them on a search of a house. The constitutionality of the ride-along practice was unsettled at the time of the incident-in-suit in *Wilson*, and remained so until this Court spoke.

fining the rules that govern a determination of probable cause . . . . As he tries to find his way in this thicket, the police officer must not be held to act at his peril." *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 456 F. 2d 1339, 1348 (1972) (on remand). In this light, *Anderson* reasoned: "Law enforcement officers whose judgments in making these difficult determinations [whether particular searches or seizures comport with the Fourth Amendment] are objectively legally reasonable should no more be held personally liable in damages than should officials making *analogous determinations* in other areas of law." 483 U. S., at 644 (emphasis added).

As the foregoing discussion indicates, however, "excessive force" typically is not an "analogous determination." The constitutional issue whether an officer's use of force was reasonable in given circumstances routinely can be answered simply by following *Graham*'s directions. In inquiring, under *Graham*, whether an officer's use of force was within a range of reasonable options, the decisionmaker is also (and necessarily) answering the question whether a reasonable officer "could have believed" his use of force "to be lawful," *Anderson*, 483 U. S., at 638. See *Street*, 929 F. 2d, at 541, n. 2 (because of difficulty of deciding probable-cause issues, the conduct of an officer may be objectively reasonable even if cause did not exist, but "in excessive force cases, once a factfinder has determined that the force used was unnecessary under the circumstances, any question of objective reasonableness has also been foreclosed").

The Court fears that dispensing with the duplicative qualified immunity inquiry will mean "leaving the whole matter to the jury." *Ante*, at 200. Again, experience teaches otherwise. Lower courts, armed with *Graham*'s directions, have not shied away from granting summary judgment to defendant officials in Fourth Amendment excessive force cases where the challenged conduct is objectively reasonable based on relevant, undisputed facts. See, *e. g.*, *Wilson* v.

Spain, 209 F. 3d 713, 716 (CA8 2000) ("address[ing] in one fell swoop both [defendant's] qualified immunity and the merits of [plaintiff's] Fourth Amendment [excessive force] claim" and concluding officer's conduct was objectively reasonable in the circumstances, so summary judgment for officer was proper); *Roy*, 42 F. 3d, at 695 (under single objective reasonableness test, District Court properly granted summary judgment for defendant);[6] *Wardlaw* v. *Pickett*, 1 F. 3d 1297, 1303–1304 (CADC 1993) (same). Indeed, this very case, as I earlier explained, see *supra*, at 210–212, fits the summary judgment bill. Of course, if an excessive force claim turns on which of two conflicting stories best captures what happened on the street, *Graham* will not permit summary judgment in favor of the defendant official. And that is as it should be. When a plaintiff proffers evidence that the official subdued her with a chokehold even though she complied at all times with his orders, while the official proffers evidence that he used only stern words, a trial must be had. In such a case, the Court's two-step procedure is altogether inutile.

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For the reasons stated, I concur in the Court's judgment, but not in the two-step inquiry the Court has ordered. Once it has been determined that an officer violated the Fourth Amendment by using "objectively unreasonable" force as

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[6] Upholding summary judgment for a police officer who shot an armed, intoxicated, belligerently behaving arrestee, the First Circuit in *Roy* elaborated: "[T]he Supreme Court intends to surround the police who make these on-the-spot choices in dangerous situations with a fairly wide zone of protection in close cases. Decisions from this circuit and other circuits are consistent with that view. And in close cases, a jury does not automatically get to second-guess these life and death decisions, even though the plaintiff has an expert and a plausible claim that the situation could better have been handled differently." 42 F. 3d, at 695 (footnote omitted).

that term is explained in *Graham* v. *Connor*, there is simply no work for a qualified immunity inquiry to do.

JUSTICE SOUTER, concurring in part and dissenting in part.

I join Parts I and II of the Court's opinion, but would remand the case for application of the qualified immunity standard.

Syllabus

UNITED STATES *v.* MEAD CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 99–1434. Argued November 8, 2000—Decided June 18, 2001

The Harmonized Tariff Schedule of the United States authorizes the United States Customs Service to classify and fix the rate of duty on imports, under rules and regulations issued by the Secretary of the Treasury. As relevant here, the Secretary provides for tariff rulings before the entry of goods by regulations authorizing "ruling letters" setting tariff classifications for particular imports. Any of the 46 port-of-entry Customs offices and the Customs Headquarters Office may issue such letters. Respondent imports "day planners," three-ring binders with pages for daily schedules, phone numbers and addresses, a calendar, and suchlike. After classifying the planners as duty free for several years, Customs Headquarters issued a ruling letter classifying them as bound diaries subject to tariff. Mead filed suit in the Court of International Trade, which granted the Government summary judgment. In reversing, the Federal Circuit found that ruling letters should not be treated like Customs regulations, which receive the highest level of deference under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, because they are not preceded by notice and comment as under the Administrative Procedure Act (APA), do not carry the force of law, and are not intended to clarify importers's rights and obligations beyond the specific case. The court gave no deference at all to the ruling letter at issue.

Held: Administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of such authority. Such delegation may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of comparable congressional intent. A Customs ruling letter has no claim to *Chevron* deference, but, under *Skidmore* v. *Swift & Co.*, 323 U. S. 134, it is eligible to claim respect according to its persuasiveness. Pp. 227–239.

(a) When Congress has explicitly left a gap for an agency to fill, there has been an express delegation of authority to the agency to elucidate a

specific statutory provision by regulation, and any ensuing regulation is binding unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute. Even in the absence of an express delegation of authority on a particular question, agencies charged with applying a statute necessarily make all sorts of interpretive choices, and while not all of those choices bind judges to follow them, they may influence courts facing questions the agencies have already answered. The weight accorded to an administrative judgment "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, *supra*, at 140. In *Chevron*, this Court identified a category of interpretive choices distinguished by an additional reason for judicial deference, recognizing that Congress engages not only in express, but also in implicit, delegation of specific interpretive authority. It can be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when addressing ambiguity in the statute or fills in a space in the enacted law, even one about which Congress did not have intent as to a particular result. When circumstances implying such an expectation exist, a reviewing court must accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable. A very good indicator of delegation meriting *Chevron* treatment is express congressional authorizations to engage in the rulemaking or adjudication process that produces the regulations or rulings for which deference is claimed. Thus, the overwhelming number of cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication. Although the fact that the tariff classification at issue was not a product of such formal process does not alone bar *Chevron*'s application, cf., *e. g.*, *NationsBank of N. C., N. A.* v. *Variable Annuity Life Ins. Co.*, 513 U. S. 251, 256–257, 263, there are ample reasons to deny *Chevron* deference here. Pp. 227–231.

(b) There is no indication on the statute's face that Congress meant to delegate authority to Customs to issue classification rulings with the force of law. Also, it is difficult to see in agency practice any indication that Customs set out with a lawmaking pretense in mind, for it does not generally engage in notice-and-comment practice and a letter's binding character as a ruling stops short of third parties. Indeed, any suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year at 46 offices is self-refuting. Nor

do statutory amendments effective after this case arose reveal a new congressional objective of treating classification decisions generally as rulemaking with force of law or suggest any intent to create a *Chevron* patchwork of classification rules, some with force of law, some without. In sum, classification rulings are best treated like "interpretations contained in policy statements, agency manuals, and enforcement guidelines," *Christensen* v. *Harris County*, 529 U. S. 576, 587, and thus beyond the *Chevron* pale. Pp. 231–234.

(c) This does not mean, however, that the letters are due no deference. *Chevron* did not eliminate *Skidmore*'s holding that an agency's interpretation may merit some deference whatever its form, given the "specialized experience and broader investigations and information" available to the agency, 323 U. S., at 139, and given the value of uniformity in its administrative and judicial understandings of what a national law requires, *id.*, at 140. There is room at least to raise a *Skidmore* claim here, where the regulatory scheme is highly detailed, and Customs can bring the benefit of specialized experience to bear on this case's questions. The classification ruling may at least seek a respect proportional to its "power to persuade," *ibid.*, and may claim the merit of its writer's thoroughness, logic and expertness, its fit with prior interpretations, and any other sources of weight. Underlying this Court's position is a choice about the best way to deal with the great variety of ways in which the laws invest the Government's administrative arms with discretion, and with procedures for exercising it, in giving meaning to Acts of Congress. The Court said nothing in *Chevron* to eliminate *Skidmore*'s recognition of various justifications for deference depending on statutory circumstances and agency action. Judicial responses to such action must continue to differentiate between the two cases. Any *Skidmore* assessment here ought to be made in the first instance by the lower courts. Pp. 234–239.

185 F. 3d 1304, vacated and remanded.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, KENNEDY, THOMAS, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed a dissenting opinion, *post*, p. 239.

Kent L. Jones argued the cause for the United States. With him on the briefs were *Solicitor General Waxman*, *Acting Assistant Attorney General Ogden*, *Deputy Solicitor*

General Wallace, William Kanter, Bruce G. Forrest, and *Neal S. Wolin.*

J. Peter Coll, Jr., argued the cause for respondent. With him on the brief were *Kristen Bancroft* and *Sidney H. Kuflik.**

JUSTICE SOUTER delivered the opinion of the Court.

The question is whether a tariff classification ruling by the United States Customs Service deserves judicial deference. The Federal Circuit rejected Customs's invocation of *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), in support of such a ruling, to which it gave no deference. We agree that a tariff classification has no claim to judicial deference under *Chevron*, there being no indication that Congress intended such a ruling to carry the force of law, but we hold that under *Skidmore* v. *Swift & Co.*, 323 U. S. 134 (1944), the ruling is eligible to claim respect according to its persuasiveness.

I

A

Imports are taxed under the Harmonized Tariff Schedule of the United States (HTSUS), 19 U. S. C. § 1202. Title 19 U. S. C. § 1500(b) provides that Customs "shall, under rules

*Briefs of *amici curiae* urging affirmance were filed for the American Association of Exporters and Importers by *Peter Buck Feller, Daniel G. Jarcho,* and *Michael J. Haungs;* for Cargill, Inc., et al. by *John M. Peterson, Michael K. Tomenga, George W. Thompson,* and *Curtis W. Knauss;* for the Customs and International Trade Bar Association by *Sidney N. Weiss* and *David Serko;* for Filofax Inc. by *Charles H. Bayar;* for the Joint Industry Group et al. by *William D. Outman II* and *Bruce N. Shulman;* and for the Tax Executives Institute, Inc., by *Timothy J. McCormally* and *Mary L. Fahey.*

Briefs of *amici curiae* were filed for the United States Association of Importers of Textiles and Apparel et al. by *Walter E. Dellinger* and *Ronald W. Gerdes;* and for Professor Thomas W. Merrill, *pro se.*

and regulations prescribed by the Secretary [of the Treasury,] . . . fix the final classification and rate of duty applicable to . . . merchandise" under the HTSUS. Section 1502(a) provides that

> "[t]he Secretary of the Treasury shall establish and promulgate such rules and regulations not inconsistent with the law (including regulations establishing procedures for the issuance of binding rulings prior to the entry of the merchandise concerned), and may disseminate such information as may be necessary to secure a just, impartial, and uniform appraisement of imported merchandise and the classification and assessment of duties thereon at the various ports of entry."[1]

See also § 1624 (general delegation to Secretary to issue rules and regulations for the admission of goods).

The Secretary provides for tariff rulings before the entry of goods by regulations authorizing "ruling letters" setting tariff classifications for particular imports. 19 CFR § 177.8 (2000). A ruling letter

> "represents the official position of the Customs Service with respect to the particular transaction or issue described therein and is binding on all Customs Service personnel in accordance with the provisions of this section until modified or revoked. In the absence of a change of practice or other modification or revocation which affects the principle of the ruling set forth in the ruling letter, that principle may be cited as authority in the disposition of transactions involving the same circumstances." § 177.9(a).

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[1] The statutory term "ruling" is defined by regulation as "a written statement . . . that interprets and applies the provisions of the Customs and related laws to a specific set of facts." 19 CFR § 177.1(d)(1) (2000).

After the transaction that gives it birth, a ruling letter is to "be applied only with respect to transactions involving articles identical to the sample submitted with the ruling request or to articles whose description is identical to the description set forth in the ruling letter." § 177.9(b)(2). As a general matter, such a letter is "subject to modification or revocation without notice to any person, except the person to whom the letter was addressed," § 177.9(c), and the regulations consequently provide that "no other person should rely on the ruling letter or assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letter," *ibid.* Since ruling letters respond to transactions of the moment, they are not subject to notice and comment before being issued, may be published but need only be made "available for public inspection," 19 U. S. C. § 1625(a), and, at the time this action arose, could be modified without notice and comment under most circumstances, 19 CFR § 177.10(c) (2000).[2] A broader notice-and-comment requirement for modification of prior rulings was added by statute in 1993, Pub. L. 103–182, § 623, 107 Stat. 2186, codified at 19 U. S. C. § 1625(c), and took effect after this case arose.[3]

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[2] The opinion of the Federal Circuit in this case noted that § 177.10(c) provides some notice-and-comment procedures for rulings that have the "'effect of changing a practice.'" 185 F. 3d 1304, 1307, n. 1 (1999). The appeals court noted that this case does not involve such a ruling, and specifically excluded such rulings from the reach of its holding. *Ibid.*

[3] As amended by legislation effective after Customs modified its classification ruling in this case, 19 U. S. C. § 1625(c) provides that a ruling or decision that would "modify . . . or revoke a prior interpretive ruling or decision which has been in effect for at least 60 days" or would "have the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions" shall be "published in the Customs Bulletin. The Secretary shall give interested parties an opportunity to submit, during not less than the 30-day period after the date of such publication, comments on the correctness of the proposed ruling or

Any of the 46[4] port-of-entry[5] Customs offices may issue ruling letters, and so may the Customs Headquarters Office, in providing "[a]dvice or guidance as to the interpretation or proper application of the Customs and related laws with respect to a specific Customs transaction [which] may be requested by Customs Service field offices . . . at any time, whether the transaction is prospective, current, or completed," 19 CFR § 177.11(a) (2000). Most ruling letters contain little or no reasoning, but simply describe goods and state the appropriate category and tariff. A few letters, like the Headquarters ruling at issue here, set out a rationale in some detail.

B

Respondent, the Mead Corporation, imports "day planners," three-ring binders with pages having room for notes of daily schedules and phone numbers and addresses, together with a calendar and suchlike. The tariff schedule on point falls under the HTSUS heading for "[r]egisters, account books, notebooks, order books, receipt books, letter pads, memorandum pads, diaries and similar articles," HTSUS subheading 4820.10, which comprises two subcategories. Items in the first, "[d]iaries, notebooks and address books, bound; memorandum pads, letter pads and similar articles," were subject to a tariff of 4.0% at the time in controversy. 185 F. 3d 1304, 1305 (CA Fed. 1999) (citing subheading 4820.10.20); see also App. to Pet. for Cert. 46a. Objects in the second, covering "[o]ther" items, were free

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decision. After consideration of any comments received, the Secretary shall publish a final ruling or decision in the Customs Bulletin within 30 days after the closing of the comment period. The final ruling or decision shall become effective 60 days after the date of its publication."

[4] Brief for Customs and International Trade Bar Association as *Amicus Curiae* 5 (CITBA Brief).

[5] *I. e.*, "a Customs location having a full range of cargo processing functions, including inspections, entry, collections, and verification." 19 CFR § 101.1 (2000).

of duty. HTSUS subheading 4820.10.40; see also App. to Pet. for Cert. 46a.

Between 1989 and 1993, Customs repeatedly treated day planners under the "other" HTSUS subheading. In January 1993, however, Customs changed its position, and issued a Headquarters ruling letter classifying Mead's day planners as "Diaries . . . , bound" subject to tariff under subheading 4820.10.20. That letter was short on explanation, App. to Brief in Opposition 4a–6a, but after Mead's protest, Customs Headquarters issued a new letter, carefully reasoned but never published, reaching the same conclusion, App. to Pet. for Cert. 28a–47a. This letter considered two definitions of "diary" from the Oxford English Dictionary, the first covering a daily journal of the past day's events, the second a book including "'printed dates for daily memoranda and jottings; also . . . calendars . . . .'" *Id.*, at 33a–34a (quoting Oxford English Dictionary 321 (Compact ed. 1982)). Customs concluded that "diary" was not confined to the first, in part because the broader definition reflects commercial usage and hence the "commercial identity of these items in the marketplace." App. to Pet. for Cert. 34a. As for the definition of "bound," Customs concluded that HTSUS was not referring to "bookbinding," but to a less exact sort of fastening described in the Harmonized Commodity Description and Coding System Explanatory Notes to Heading 4820, which spoke of binding by "'reinforcements or fittings of metal, plastics, etc.'" *Id.*, at 45a.

Customs rejected Mead's further protest of the second Headquarters ruling letter, and Mead filed suit in the Court of International Trade (CIT). The CIT granted the Government's motion for summary judgment, adopting Customs's reasoning without saying anything about deference. 17 F. Supp. 2d 1004 (1998).

Mead then went to the United States Court of Appeals for the Federal Circuit. While the case was pending there this Court decided *United States* v. *Haggar Apparel Co.*, 526

U. S. 380 (1999), holding that Customs regulations receive the deference described in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). The appeals court requested briefing on the impact of *Haggar*, and the Government argued that classification rulings, like Customs regulations, deserve *Chevron* deference.

The Federal Circuit, however, reversed the CIT and held that Customs classification rulings should not get *Chevron* deference, owing to differences from the regulations at issue in *Haggar*. Rulings are not preceded by notice and comment as under the Administrative Procedure Act (APA), 5 U. S. C. § 553, they "do not carry the force of law and are not, like regulations, intended to clarify the rights and obligations of importers beyond the specific case under review." 185 F. 3d, at 1307. The appeals court thought classification rulings had a weaker *Chevron* claim even than Internal Revenue Service interpretive rulings, to which that court gives no deference; unlike rulings by the IRS, Customs rulings issue from many locations and need not be published. 185 F. 3d, at 1307–1308.

The Court of Appeals accordingly gave no deference at all to the ruling classifying the Mead day planners and rejected the agency's reasoning as to both "diary" and "bound." It thought that planners were not diaries because they had no space for "relatively extensive notations about events, observations, feelings, or thoughts" in the past. *Id.*, at 1310. And it concluded that diaries "bound" in subheading 4810.10.20 presupposed "unbound" diaries, such that treating ring-fastened diaries as "bound" would leave the "unbound diary" an empty category. *Id.*, at 1311.

We granted certiorari, 530 U. S. 1202 (2000), in order to consider the limits of *Chevron* deference owed to administrative practice in applying a statute. We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make

rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent. The Customs ruling at issue here fails to qualify, although the possibility that it deserves some deference under *Skidmore* leads us to vacate and remand.

II

A

When Congress has "explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," *Chevron*, 467 U. S., at 843–844, and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute.[6] See *id.*, at 844; *United States* v. *Morton*, 467 U. S. 822, 834 (1984); APA, 5 U. S. C. §§ 706(2)(A), (D). But whether or not they enjoy any express delegation of authority on a particular question, agencies charged with applying a statute necessarily make all sorts of interpretive choices, and while not all of those choices bind judges to follow them, they certainly may influence courts facing questions the agencies have already answered. "[T]he well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance,'" *Bragdon* v. *Abbott*, 524 U. S. 624, 642 (1998) (quoting *Skidmore*, 323 U. S., at 139–140), and "[w]e have long recognized that considerable weight should be accorded to an executive department's

[6] Assuming in each case, of course, that the agency's exercise of authority is constitutional, see 5 U. S. C. § 706(2)(B), and does not exceed its jurisdiction, see § 706(2)(C).

construction of a statutory scheme it is entrusted to administer . . . ." *Chevron, supra,* at 844 (footnote omitted); see also *Ford Motor Credit Co.* v. *Milhollin,* 444 U. S. 555, 565 (1980); *Zenith Radio Corp.* v. *United States,* 437 U. S. 443, 450 (1978). The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care,[7] its consistency,[8] formality,[9] and relative expertness,[10] and to the persuasiveness of the agency's position, see *Skidmore, supra,* at 139–140. The approach has produced a spectrum of judicial responses, from great respect at one end, see, *e. g., Aluminum Co. of America* v. *Central Lincoln Peoples' Util. Dist.,* 467 U. S. 380, 389–390 (1984) ("'substantial deference'" to administrative construction), to near indifference at the other, see, *e. g., Bowen* v. *Georgetown Univ. Hospital,* 488 U. S. 204, 212–213 (1988) (interpretation advanced for the first time in a litigation brief). Justice Jackson summed things up in *Skidmore* v. *Swift & Co.:*

> "The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U. S., at 140.

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[7] See, *e. g., General Elec. Co.* v. *Gilbert,* 429 U. S. 125, 142 (1976) (courts consider the "'thoroughness evident in [the agency's] consideration'" (quoting *Skidmore* v. *Swift & Co.,* 323 U. S. 134, 140 (1944))).

[8] See, *e. g., Good Samaritan Hospital* v. *Shalala,* 508 U. S. 402, 417 (1993) ("[T]he consistency of an agency's position is a factor in assessing the weight that position is due").

[9] See, *e. g., Reno* v. *Koray,* 515 U. S. 50, 61 (1995) (internal agency guideline that is not "subject to the rigors of the [APA], including public notice and comment," is entitled only to "some deference" (internal quotation marks omitted)).

[10] See, *e. g., Aluminum Co. of America* v. *Central Lincoln Peoples' Util. Dist.,* 467 U. S. 380, 390 (1984).

Since 1984, we have identified a category of interpretive choices distinguished by an additional reason for judicial deference. This Court in *Chevron* recognized that Congress not only engages in express delegation of specific interpretive authority, but that "[s]ometimes the legislative delegation to an agency on a particular question is implicit." 467 U. S., at 844. Congress, that is, may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which "Congress did not actually have an intent" as to a particular result. *Id.*, at 845. When circumstances implying such an expectation exist, a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise, see *id.*, at 845–846, but is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable, see *id.*, at 842–845; cf. 5 U. S. C. § 706(2) (a reviewing court shall set aside agency action, findings, and conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed. See, *e. g.*, *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 257 (1991) (no *Chevron* deference to agency guideline where congressional delegation did not include the power to "'promulgate rules or regulations'" (quoting *General Elec. Co.* v. *Gilbert*, 429 U. S. 125, 141

(1976))); see also *Christensen* v. *Harris County*, 529 U. S. 576, 596–597 (2000) (BREYER, J., dissenting) (where it is in doubt that Congress actually intended to delegate particular interpretive authority to an agency, *Chevron* is "inapplicable"). It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.[11] Cf. *Smiley* v. *Citibank (South Dakota), N. A.*, 517 U. S. 735, 741 (1996) (APA notice and comment "designed to assure due deliberation"). Thus, the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication.[12] That said, and as sig-

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[11] See Merrill & Hickman, *Chevron*'s Domain, 89 Geo. L. J. 833, 872 (2001) ("[I]f *Chevron* rests on a presumption about congressional intent, then *Chevron* should apply only where Congress would want *Chevron* to apply. In delineating the types of delegations of agency authority that trigger *Chevron* deference, it is therefore important to determine whether a plausible case can be made that Congress would want such a delegation to mean that agencies enjoy primary interpretational authority").

[12] For rulemaking cases, see, *e. g.*, *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U. S. 1, 20–21 (2000); *United States* v. *Haggar Apparel Co.*, 526 U. S. 380 (1999); *AT&T Corp.* v. *Iowa Utilities Bd.*, 525 U. S. 366 (1999); *Atlantic Mut. Ins. Co.* v. *Commissioner*, 523 U. S. 382 (1998); *Regions Hospital* v. *Shalala*, 522 U. S. 448 (1998); *United States* v. *O'Hagan*, 521 U. S. 642 (1997); *Smiley* v. *Citibank (South Dakota), N. A.*, 517 U. S. 735 (1996); *Babbitt* v. *Sweet Home Chapter, Communities for Great Ore.*, 515 U. S. 687 (1995); *ICC* v. *Transcon Lines*, 513 U. S. 138 (1995); *PUD No. 1 of Jefferson Cty.* v. *Washington Dept. of Ecology*, 511 U. S. 700 (1994); *Good Samaritan Hospital* v. *Shalala*, *supra*; *American Hospital Assn.* v. *NLRB*, 499 U. S. 606 (1991); *Sullivan* v. *Everhart*, 494 U. S. 83 (1990); *Sullivan* v. *Zebley*, 493 U. S. 521 (1990); *Massachusetts* v. *Morash*, 490 U. S. 107 (1989); *K mart Corp.* v. *Cartier, Inc.*, 486 U. S. 281 (1988); *Atkins* v. *Rivera*, 477 U. S. 154 (1986); *United States* v. *Fulton*, 475 U. S. 657 (1986); *United States* v. *Riverside Bayview Homes, Inc.*, 474 U. S. 121 (1985).

For adjudication cases, see, *e. g.*, *INS* v. *Aguirre-Aguirre*, 526 U. S. 415, 423–425 (1999); *Federal Employees* v. *Department of Interior*, 526 U. S.

nificant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded, see, *e. g.*, *NationsBank of N. C., N. A.* v. *Variable Annuity Life Ins. Co.*, 513 U. S. 251, 256–257, 263 (1995).[13] The fact that the tariff classification here was not a product of such formal process does not alone, therefore, bar the application of *Chevron*.

There are, nonetheless, ample reasons to deny *Chevron* deference here. The authorization for classification rulings, and Customs's practice in making them, present a case far removed not only from notice-and-comment process, but from any other circumstances reasonably suggesting that Congress ever thought of classification rulings as deserving the deference claimed for them here.

B

No matter which angle we choose for viewing the Customs ruling letter in this case, it fails to qualify under *Chevron*. On the face of the statute, to begin with, the terms of the congressional delegation give no indication that Congress meant to delegate authority to Customs to issue classifica-

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86, 98–99 (1999); *Holly Farms Corp.* v. *NLRB*, 517 U. S. 392 (1996); *ABF Freight System, Inc.* v. *NLRB*, 510 U. S. 317, 324–325 (1994); *National Railroad Passenger Corporation* v. *Boston & Maine Corp.*, 503 U. S. 407, 417–418 (1992); *Norfolk & Western R. Co.* v. *Train Dispatchers*, 499 U. S. 117, 128 (1991); *Fort Stewart Schools* v. *FLRA*, 495 U. S. 641, 644–645 (1990); *Department of Treasury, IRS* v. *FLRA*, 494 U. S. 922 (1990).

[13] In *NationsBank of N. C., N. A.* v. *Variable Annuity Life Ins. Co.*, 513 U. S., at 256–257 (internal quotation marks omitted), we quoted longstanding precedent concluding that "[t]he Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of [the rule of deference] with respect to his deliberative conclusions as to the meaning of these laws." See also 1 M. Malloy, Banking Law and Regulation § 1.3.1, p. 1.41 (1996) (stating that the Comptroller is given "personal authority" under the National Bank Act).

tion rulings with the force of law. We are not, of course, here making any global statement about Customs's authority, for it is true that the general rulemaking power conferred on Customs, see 19 U. S. C. § 1624, authorizes some regulation with the force of law, or "legal norms," as we put it in *Haggar*, 526 U. S., at 391.[14] It is true as well that Congress had classification rulings in mind when it explicitly authorized, in a parenthetical, the issuance of "regulations establishing procedures for the issuance of binding rulings prior to the entry of the merchandise concerned," 19 U. S. C. § 1502(a).[15] The reference to binding classifications does not, however, bespeak the legislative type of activity that would naturally bind more than the parties to the ruling, once the goods classified are admitted into this country. And though the statute's direction to disseminate "information" necessary to "secure" uniformity, *ibid.*, seems to assume that a ruling may be precedent in later transactions, precedential value alone does not add up to *Chevron* entitlement; interpretive rules may sometimes function as precedents, see Strauss, The Rulemaking Continuum, 41 Duke L. J. 1463, 1472–1473 (1992), and they enjoy no *Chevron* status as a class. In any event, any precedential claim of a classification ruling is counterbalanced by the provision for independent review of Customs classifications by the CIT, see 28 U. S. C. §§ 2638–2640; the scheme for CIT review includes a provision that treats classification rulings on par with the Secretary's rulings on "valuation, rate of duty, marking, restricted mer-

[14] Cf. *Adams Fruit Co.* v. *Barrett*, 494 U. S. 638, 649–650 (1990) (although Congress required the Secretary of Labor to promulgate standards implementing certain provisions of the Migrant and Seasonal Agricultural Worker Protection Act, and "agency determinations within the scope of delegated authority are entitled to deference," the Secretary's interpretation of the Act's enforcement provisions is not entitled to *Chevron* deference because "[n]o such delegation regarding [those] provisions is evident in the statute").

[15] The ruling in question here, however, does not fall within that category.

chandise, entry requirements, drawbacks, vessel repairs, or similar matters," § 1581(h); see § 2639(b). It is hard to imagine a congressional understanding more at odds with the *Chevron* regime.[16]

It is difficult, in fact, to see in the agency practice itself any indication that Customs ever set out with a lawmaking pretense in mind when it undertook to make classifications like these. Customs does not generally engage in notice-and-comment practice when issuing them, and their treatment by the agency makes it clear that a letter's binding character as a ruling stops short of third parties; Customs has regarded a classification as conclusive only as between itself and the importer to whom it was issued, 19 CFR § 177.9(c) (2000), and even then only until Customs has given advance notice of intended change, §§ 177.9(a), (c). Other importers are in fact warned against assuming any right of detrimental reliance. § 177.9(c).

Indeed, to claim that classifications have legal force is to ignore the reality that 46 different Customs offices issue 10,000 to 15,000 of them each year, see Brief for Respondent 5; CITBA Brief 6 (citing Treasury Advisory Committee on the Commercial Operations of the United States Customs Service, Report of the COAC Subcommittee on OR&R, Exhs. 1, 3 (Jan. 26, 2000) (reprinted in App. to CITBA Brief 20a–21a)). Any suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year at an agency's 46 scattered offices is simply self-refuting. Although the circumstances are less startling here, with a Headquarters letter in issue, none of the relevant statutes recognizes this category of rulings as separate or different from others; there is thus no indication that a

[16] Although Customs's decision "is presumed to be correct" on review, 28 U. S. C. § 2639(a)(1), the CIT "may consider any new ground" even if not raised below, § 2638, and "shall make its determinations upon the basis of the record made before the court," rather than that developed by Customs, § 2640(a); see generally *Haggar Apparel*, 526 U. S., at 391.

more potent delegation might have been understood as going to Headquarters even when Headquarters provides developed reasoning, as it did in this instance.

Nor do the amendments to the statute made effective after this case arose disturb our conclusion. The new law requires Customs to provide notice-and-comment procedures only when modifying or revoking a prior classification ruling or modifying the treatment accorded to substantially identical transactions, 19 U. S. C. § 1625(c); and under its regulations, Customs sees itself obliged to provide notice-and-comment procedures only when "changing a practice" so as to produce a tariff increase, or in the imposition of a restriction or prohibition, or when Customs Headquarters determines that "the matter is of sufficient importance to involve the interests of domestic industry," 19 CFR §§ 177.10(c)(1), (2) (2000). The statutory changes reveal no new congressional objective of treating classification decisions generally as rulemaking with force of law, nor do they suggest any intent to create a *Chevron* patchwork of classification rulings, some with force of law, some without.

In sum, classification rulings are best treated like "interpretations contained in policy statements, agency manuals, and enforcement guidelines." *Christensen*, 529 U. S., at 587. They are beyond the *Chevron* pale.

C

To agree with the Court of Appeals that Customs ruling letters do not fall within *Chevron* is not, however, to place them outside the pale of any deference whatever. *Chevron* did nothing to eliminate *Skidmore*'s holding that an agency's interpretation may merit some deference whatever its form, given the "specialized experience and broader investigations and information" available to the agency, 323 U. S., at 139, and given the value of uniformity in its administrative and judicial understandings of what a national law requires, *id.*, at 140. See generally *Metropolitan Stevedore Co.* v.

Rambo, 521 U. S. 121, 136 (1997) (reasonable agency interpretations carry "at least some added persuasive force" where *Chevron* is inapplicable); *Reno* v. *Koray*, 515 U. S. 50, 61 (1995) (according "some deference" to an interpretive rule that "do[es] not require notice and comment"); *Martin* v. *Occupational Safety and Health Review Comm'n*, 499 U. S. 144, 157 (1991) ("some weight" is due to informal interpretations though not "the same deference as norms that derive from the exercise of . . . delegated lawmaking powers").

There is room at least to raise a *Skidmore* claim here, where the regulatory scheme is highly detailed, and Customs can bring the benefit of specialized experience to bear on the subtle questions in this case: whether the daily planner with room for brief daily entries falls under "diaries," when diaries are grouped with "notebooks and address books, bound; memorandum pads, letter pads and similar articles," HTSUS subheading 4820.10.20; and whether a planner with a ring binding should qualify as "bound," when a binding may be typified by a book, but also may have "reinforcements or fittings of metal, plastics, etc.," Harmonized Commodity Description and Coding System Explanatory Notes to Heading 4820, p. 687 (cited in Customs Headquarters letter, App. to Pet. for Cert. 45a. A classification ruling in this situation may therefore at least seek a respect proportional to its "power to persuade," *Skidmore*, *supra*, at 140; see also *Christensen*, 529 U. S., at 587; *id.*, at 595 (STEVENS, J., dissenting); *id.*, at 596–597 (BREYER, J., dissenting). Such a ruling may surely claim the merit of its writer's thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight.

D

Underlying the position we take here, like the position expressed by JUSTICE SCALIA in dissent, is a choice about the best way to deal with an inescapable feature of the

body of congressional legislation authorizing administrative action. That feature is the great variety of ways in which the laws invest the Government's administrative arms with discretion, and with procedures for exercising it, in giving meaning to Acts of Congress. Implementation of a statute may occur in formal adjudication or the choice to defend against judicial challenge; it may occur in a central board or office or in dozens of enforcement agencies dotted across the country; its institutional lawmaking may be confined to the resolution of minute detail or extend to legislative rulemaking on matters intentionally left by Congress to be worked out at the agency level.

Although we all accept the position that the Judiciary should defer to at least some of this multifarious administrative action, we have to decide how to take account of the great range of its variety. If the primary objective is to simplify the judicial process of giving or withholding deference, then the diversity of statutes authorizing discretionary administrative action must be declared irrelevant or minimized. If, on the other hand, it is simply implausible that Congress intended such a broad range of statutory authority to produce only two varieties of administrative action, demanding either *Chevron* deference or none at all, then the breadth of the spectrum of possible agency action must be taken into account. JUSTICE SCALIA's first priority over the years has been to limit and simplify. The Court's choice has been to tailor deference to variety.[17] This accept-

[17] Compare *Christensen* v. *Harris County*, 529 U. S. 576, 587 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference"), and *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 257–258 (1991) (applying *Skidmore* analysis where Congress did not confer upon the agency authority to promulgate rules or regulations), with *Christensen*, *supra*, at 589–591 (SCALIA, J., concurring in part and concurring in judgment) (urging *Chevron* treatment); *EEOC* v. *Arabian American Oil Co.*, *supra*, at 259–260 (SCALIA, J., concurring in part and concurring

ance of the range of statutory variation has led the Court to recognize more than one variety of judicial deference, just as the Court has recognized a variety of indicators that Congress would expect *Chevron* deference.[18]

Our respective choices are repeated today. JUSTICE SCALIA would pose the question of deference as an either-or choice. On his view that *Chevron* rendered *Skidmore* anachronistic, when courts owe any deference it is *Chevron* deference that they owe, *post*, at 250. Whether courts do owe deference in a given case turns, for him, on whether the agency action (if reasonable) is "authoritative," *post*, at 257. The character of the authoritative derives, in turn, not from breadth of delegation or the agency's procedure in implementing it, but is defined as the "official" position of an agency, *ibid.*, and may ultimately be a function of administrative persistence alone, *ante*, at 258.

The Court, on the other hand, said nothing in *Chevron* to eliminate *Skidmore*'s recognition of various justifications for deference depending on statutory circumstances and agency action; *Chevron* was simply a case recognizing that even without express authority to fill a specific statutory gap, circumstances pointing to implicit congressional delegation present a particularly insistent call for deference. Indeed, in holding here that *Chevron* left *Skidmore* intact and applicable where statutory circumstances indicate no intent to delegate general authority to make rules with force of law, or where such authority was not invoked, we hold nothing more than we said last Term in response to the particular

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in judgment) (urging *Chevron* treatment); see also *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 453–455 (1987) (SCALIA, J., concurring in judgment) (urging broader application of *Chevron*).

[18] It is, of course, true that the limit of *Chevron* deference is not marked by a hard-edged rule. But *Chevron* itself is a good example showing when *Chevron* deference is warranted, while this is a good case showing when it is not. Judges in other, perhaps harder, cases will make reasoned choices between the two examples, the way courts have always done.

statutory circumstances in *Christensen*, to which JUSTICE SCALIA then took exception, see 529 U. S., at 589, just as he does again today.

We think, in sum, that JUSTICE SCALIA's efforts to simplify ultimately run afoul of Congress's indications that different statutes present different reasons for considering respect for the exercise of administrative authority or deference to it. Without being at odds with congressional intent much of the time, we believe that judicial responses to administrative action must continue to differentiate between *Chevron* and *Skidmore*, and that continued recognition of *Skidmore* is necessary for just the reasons Justice Jackson gave when that case was decided.[19]

* * *

Since the *Skidmore* assessment called for here ought to be made in the first instance by the Court of Appeals for the

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[19] Surely Justice Jackson's practical criteria, along with *Chevron*'s concern with congressional understanding, provide more reliable guideposts than conclusory references to the "authoritative" or "official." Even if those terms provided a true criterion, there would have to be something wrong with a standard that accorded the status of substantive law to every one of 10,000 "official" customs classifications rulings turned out each year from over 46 offices placed around the country at the Nation's entryways. JUSTICE SCALIA tries to avoid that result by limiting what is "authoritative" or "official" to a pronouncement that expresses the "judgment of central agency management, approved at the highest levels," as distinct from the pronouncements of "underlings," *post*, at 259, n. 6. But that analysis would not entitle a Headquarters ruling to *Chevron* deference; the "highest level" at Customs is the source of the regulation at issue in *Haggar*, the Commissioner of Customs with the approval of the Secretary of the Treasury. 526 U. S., at 386. The Commissioner did not issue the Headquarters ruling. What JUSTICE SCALIA has in mind here is that because the Secretary approved the Government's position in its brief to this Court, *Chevron* deference is due. But if that is so, *Chevron* deference was not called for until sometime after the litigation began, when central management at the highest level decided to defend the ruling, and the deference is not to the classification ruling as such but to the brief. This explains why the Court has not accepted JUSTICE SCALIA's position.

Federal Circuit or the CIT, we go no further than to vacate the judgment and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, dissenting.

Today's opinion makes an avulsive change in judicial review of federal administrative action. Whereas previously a reasonable agency application of an ambiguous statutory provision had to be sustained so long as it represented the agency's authoritative interpretation, henceforth such an application can be set aside unless "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law," as by giving an agency "power to engage in adjudication or notice-and-comment rulemaking, or . . . some other [procedure] indicati[ng] comparable congressional intent," and "the agency interpretation claiming deference was promulgated in the exercise of that authority." *Ante*, at 226–227.[1] What was previously a general presumption of authority in agencies to resolve ambiguity in the statutes they have been authorized to enforce has been changed to a presumption of no such authority, which must be overcome by affirmative legislative intent to the contrary. And whereas previously, when agency authority to resolve ambiguity did not exist the court was free to give the statute what it considered the best interpretation, henceforth the court must supposedly give the agency view some indeterminate amount of so-called *Skidmore* deference. *Skidmore* v. *Swift & Co.*, 323 U. S. 134 (1944). We will be sorting out the consequences of the *Mead* doctrine, which has today replaced the *Chevron* doctrine, *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), for years to come. I would adhere to our established jurisprudence,

[1] It is not entirely clear whether the formulation newly minted by the Court today extends to both formal and informal adjudication, or simply the former. Cf., *e. g.*, *ante*, at 230.

defer to the reasonable interpretation the Customs Service has given to the statute it is charged with enforcing, and reverse the judgment of the Court of Appeals.

I

Only five years ago, the Court described the *Chevron* doctrine as follows: "We accord deference to agencies under *Chevron* . . . because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows," *Smiley* v. *Citibank (South Dakota), N. A.*, 517 U. S. 735, 740–741 (1996) (citing *Chevron*, *supra*, at 843–844). Today the Court collapses this doctrine, announcing instead a presumption that agency discretion does not exist unless the statute, expressly or impliedly, says so. While the Court disclaims any hard-and-fast rule for determining the existence of discretion-conferring intent, it asserts that "a very good indicator [is] express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed," *ante*, at 229. Only when agencies act through "adjudication[,] notice-and-comment rulemaking, or . . . some other [procedure] indicati[ng] comparable congressional intent [whatever that means]" is *Chevron* deference applicable—because these "relatively formal administrative procedure[s] [designed] to foster . . . fairness and deliberation" bespeak (according to the Court) congressional willingness to have the agency, rather than the courts, resolve statutory ambiguities. *Ante*, at 227, 230. Once it is determined that *Chevron* deference is not in order, the uncertainty is not at an end—and indeed is just beginning. Litigants cannot then assume that the statutory question is one for the courts to determine, accord-

ing to traditional interpretive principles and by their own judicial lights. No, the Court now resurrects, in full force, the pre-*Chevron* doctrine of *Skidmore* deference, see *Skidmore*, *supra*, whereby "[t]he fair measure of deference to an agency administering its own statute . . . var[ies] with circumstances," including "the degree of the agency's care, its consistency, formality, and relative expertness, and . . . the persuasiveness of the agency's position," *ante*, at 228 (footnotes omitted). The Court has largely replaced *Chevron*, in other words, with that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th'ol' "totality of the circumstances" test.

The Court's new doctrine is neither sound in principle nor sustainable in practice.

A

As to principle: The doctrine of *Chevron*—that all *authoritative* agency interpretations of statutes they are charged with administering deserve deference—was rooted in a legal presumption of congressional intent, important to the division of powers between the Second and Third Branches. When, *Chevron* said, Congress leaves an ambiguity in a statute that is to be administered by an executive agency, it is presumed that Congress meant to give the agency discretion, within the limits of reasonable interpretation, as to how the ambiguity is to be resolved. By committing enforcement of the statute to an agency rather than the courts, Congress committed its initial and primary interpretation to that branch as well.

There is some question whether *Chevron* was faithful to the text of the Administrative Procedure Act (APA), which it did not even bother to cite.[2] But it was in accord with the

[2] Title 5 U. S. C. §706 provides that, in reviewing agency action, the court shall "decide all relevant questions of law"—which would seem to mean that all statutory ambiguities are to be resolved judicially. See

origins of federal-court judicial review. Judicial control of federal executive officers was principally exercised through the prerogative writ of mandamus. See L. Jaffe, Judicial Control of Administrative Action 166, 176–177 (1965). That writ generally would not issue unless the executive officer was acting plainly beyond the scope of his authority.

> "The questions mooted before the Secretary and decided by him were whether the fund is a tribal fund, whether the tribe is still existing and whether the distribution of the annuities is to be confined to members of the tribe . . . . These are all questions of law the solution of which requires a construction of the act of 1889 and other related acts. A reading of these acts shows that they fall short of plainly requiring that any of the questions be answered in the negative and that in some aspects they give color to the affirmative answers of the Secretary. That the construction of the acts insofar as they have a bearing on the first and third questions is sufficiently uncertain to involve the exercise of judgment and discretion is rather plain. . . .
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> . . . . .
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> "From what has been said it follows that the case is not one in which mandamus will lie." *Wilbur* v. *United States ex rel. Kadrie*, 281 U. S. 206, 221–222 (1930).

Anthony, The Supreme Court and the APA: Sometimes They Just Don't Get It, 10 Am. U. Admin. L. J. 1, 9–11 (1996). It could be argued, however, that the legal presumption identified by *Chevron* left as the only "questio[n] of law" whether the agency's interpretation had gone beyond the scope of discretion that the statutory ambiguity conferred. Today's opinion, of course, is no more observant of the APA's text than *Chevron* was—and indeed is even more difficult to reconcile with it. Since the opinion relies upon actual congressional intent to suspend § 706, rather than upon a legal presumption against which § 706 was presumably enacted, it runs head-on into the provision of the APA which specifies that the Act's requirements (including the requirement that judges shall "decide all relevant questions of law") cannot be amended except expressly. See § 559.

Statutory ambiguities, in other words, were left to reasonable resolution by the Executive.

The basis in principle for today's new doctrine can be described as follows: The background rule is that ambiguity in legislative instructions to agencies is to be resolved not by the agencies but by the judges. Specific congressional intent to depart from this rule must be found—and while there is no single touchstone for such intent it can generally be found when Congress has authorized the agency to act through (what the Court says is) relatively formal procedures such as informal rulemaking and formal (and informal?) adjudication, and when the agency in fact employs such procedures. The Court's background rule is contradicted by the origins of judicial review of administrative action. But in addition, the Court's principal criterion of congressional intent to supplant its background rule seems to me quite implausible. There is no necessary connection between the formality of procedure and the power of the entity administering the procedure to resolve authoritatively questions of law. The most formal of the procedures the Court refers to—formal adjudication—is modeled after the process used in trial courts, which of course are not generally accorded deference on questions of law. The purpose of such a procedure is to produce a closed record for determination and review of the facts—which implies nothing about the power of the agency subjected to the procedure to resolve authoritatively questions of law.

As for informal rulemaking: While formal adjudication procedures are *prescribed* (either by statute or by the Constitution), see 5 U. S. C. §§ 554, 556; *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 50 (1950), informal rulemaking is more typically *authorized* but not required. Agencies with such authority are free to give guidance through rulemaking, but they may proceed to administer their statute case-by-case, "making law" as they implement their program (not necessarily through formal adjudication). See *NLRB* v. *Bell*

Aerospace Co., 416 U. S. 267, 290–295 (1974); *SEC* v. *Chenery Corp.*, 332 U. S. 194, 202–203 (1947). Is it likely—or indeed even plausible—that Congress meant, when such an agency chooses rulemaking, to accord the administrators of that agency, *and their successors*, the flexibility of interpreting the ambiguous statute now one way, and later another; but, when such an agency chooses case-by-case administration, to eliminate all future agency discretion by having that same ambiguity resolved authoritatively (and forever) by the courts?[3] Surely that makes no sense. It is also the case that certain significant categories of rules—those involving grant and benefit programs, for example, are exempt from the requirements of informal rulemaking. See 5 U. S. C. § 553(a)(2). Under the Court's novel theory, when an agency takes advantage of that exemption its rules will be deprived of *Chevron* deference, *i. e.*, authoritative effect. Was this either the plausible intent of the APA rulemaking exemption, or the plausible intent of the Congress that established the grant or benefit program?

Some decisions that are neither informal rulemaking nor formal adjudication are required to be made personally by a Cabinet Secretary, without any prescribed procedures. See, *e. g.*, *United States* v. *Giordano*, 416 U. S. 505, 508 (1974) (involving application of 18 U. S. C. § 2516 (1970 ed.), requiring wiretap applications to be authorized by "[t]he Attorney General, or any Assistant Attorney General specially designated by the Attorney General"); *D. C. Federation of Civic Assns.* v. *Volpe*, 459 F. 2d 1231, 1248–1249 (CADC 1971) (involving application of 23 U. S. C. § 138 (1970 ed.) requiring the Secretary of Transportation to determine that there is "no feasible and prudent alternative to the use of" publicly owned parkland for a federally funded highway), cert. denied, 405 U. S. 1030 (1972). Is it conceivable that decisions

[3] See *infra*, at 247–250.

specifically committed to these high-level officers are meant to be accorded no deference, while decisions by an administrative law judge left in place without further discretionary agency review, see 5 U. S. C. § 557(b), are authoritative? This seems to me quite absurd, and not at all in accord with any plausible actual intent of Congress.

B

As for the practical effects of the new rule:

1

The principal effect will be protracted confusion. As noted above, the one test for *Chevron* deference that the Court enunciates is wonderfully imprecise: whether "Congress delegated authority to the agency generally to make rules carrying the force of law, . . . as by . . . adjudication[,] notice-and-comment rulemaking, or . . . some other [procedure] indicati[ng] comparable congressional intent." But even this description does not do justice to the utter flabbiness of the Court's criterion, since, in order to maintain the fiction that the new test is really just the old one, applied consistently throughout our case law, the Court must make a virtually open-ended exception to its already imprecise guidance: In the present case, it tells us, the absence of notice-and-comment rulemaking (and "[who knows?] [of] some other [procedure] indicati[ng] comparable congressional intent") is not enough to decide the question of *Chevron* deference, "for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded." *Ante*, at 226–227, 231. The opinion then goes on to consider a grab bag of other factors—including the factor that used to be the sole criterion for *Chevron* deference: whether the interpretation represented the *authoritative* position of the agency, see *ante*,

at 231–234. It is hard to know what the lower courts are to make of today's guidance.

2

Another practical effect of today's opinion will be an artificially induced increase in informal rulemaking. Buy stock in the GPO. Since informal rulemaking and formal adjudication are the only more-or-less safe harbors from the storm that the Court has unleashed; and since formal adjudication is not an option but must be mandated by statute or constitutional command; informal rulemaking—which the Court was once careful to make voluntary unless required by statute, see *Bell Aerospace*, *supra*, and *Chenery*, *supra*—will now become a virtual necessity. As I have described, the Court's safe harbor requires not merely that the agency have been given rulemaking authority, but also that the agency have *employed* rulemaking as the means of resolving the statutory ambiguity. (It is hard to understand why that should be so. Surely the mere *conferral* of rulemaking authority demonstrates—if one accepts the Court's logic—a congressional intent to allow the agency to resolve ambiguities. And given that intent, what difference does it make that the agency chooses instead to use another perfectly permissible means for that purpose?) Moreover, the majority's approach will have a perverse effect on the rules that do emerge, given the principle (which the Court leaves untouched today) that judges must defer to reasonable agency interpretations of their own regulations. See, *e. g.*, *United States* v. *Cleveland Indians Baseball Co.*, 532 U. S. 200, 220 (2001) ("We need not decide whether the [informal] Revenue Rulings themselves are entitled to deference[, . . . because] the Rulings simply reflect the agency's longstanding interpretation of its own regulations"). Agencies will now have high incentive to rush out barebones, ambiguous rules construing statutory ambiguities, which they can then in turn further clarify through informal rulings entitled to judicial respect.

Worst of all, the majority's approach will lead to the ossification of large portions of our statutory law. Where *Chevron* applies, statutory ambiguities remain ambiguities subject to the agency's ongoing clarification. They create a space, so to speak, for the exercise of continuing agency discretion. As *Chevron* itself held, the Environmental Protection Agency can interpret "stationary source" to mean a single smokestack, can later replace that interpretation with the "bubble concept" embracing an entire plant, and if that proves undesirable can return again to the original interpretation. 467 U. S., at 853–859, 865–866. For the indeterminately large number of statutes taken out of *Chevron* by today's decision, however, ambiguity (and hence flexibility) will cease with the first judicial resolution. *Skidmore* deference gives the agency's current position some vague and uncertain amount of respect, but it does not, like *Chevron*, *leave* the matter within the control of the Executive Branch for the future. Once the court has spoken, it becomes *unlawful* for the agency to take a contradictory position; the statute now *says* what the court has prescribed. See *Neal* v. *United States*, 516 U. S. 284, 295 (1996); *Lechmere, Inc.* v. *NLRB*, 502 U. S. 527, 536–537 (1992); *Maislin Industries, U. S., Inc.* v. *Primary Steel, Inc.*, 497 U. S. 116, 131 (1990). It will be bad enough when this ossification occurs as a result of judicial determination (under today's new principles) that there is no affirmative indication of congressional intent to "delegate"; but it will be positively bizarre when it occurs simply because of an agency's failure to act by rulemaking (rather than informal adjudication) before the issue is presented to the courts.

One might respond that such ossification would not result if the agency were simply to readopt its interpretation, after a court reviewing it under *Skidmore* had rejected it, by repromulgating it through one of the *Chevron*-eligible procedural formats approved by the Court today. Approving this

procedure would be a landmark abdication of judicial power. It is worlds apart from *Chevron* proper, where the court does not *purport* to give the statute a judicial interpretation—except in identifying the scope of the statutory ambiguity, as to which the court's judgment is final and irreversible. (Under *Chevron* proper, when the agency's authoritative interpretation comes within the scope of that ambiguity—and the court therefore approves it—the agency will not be "overruling" the court's decision when it later decides that a different interpretation (still within the scope of the ambiguity) is preferable.) By contrast, under this view, the reviewing court will not be holding the agency's authoritative interpretation within the scope of the ambiguity; but will be holding that the agency has not used the "delegation-conferring" procedures, and that the court must therefore *interpret the statute on its own*—but subject to reversal if and when the agency uses the proper procedures.

One is reminded of Justice Jackson's words in *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S. 103, 113 (1948):

> "The court below considered that after it reviewed the Board's order its judgment would be submitted to the President, that his power to disapprove would apply after as well as before the court acts, and hence that there would be no chance of a deadlock and no conflict of function. But if the President may completely disregard the judgment of the court, it would be only because it is one the courts were not authorized to render. Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government."

I know of no case, in the entire history of the federal courts, in which we have allowed a judicial interpretation of a statute to be set aside by an agency—or have allowed a

lower court to render an interpretation of a statute subject to correction by an agency. As recently as 1996, we rejected an attempt to do *precisely* that. In *Chapman* v. *United States*, 500 U. S. 453 (1991), we had held that the weight of the blotter paper bearing the lysergic acid diethylamide (LSD) must be counted for purposes of determining whether the quantity crossed the 10-gram threshold of 21 U. S. C. § 841(b)(1)(A)(v) imposing a minimum sentence of 10 years. At that time the United States Sentencing Commission applied a similar approach under the Sentencing Guidelines, but had taken no position regarding the meaning of the statutory provision. The Commission later changed its Guidelines approach, and, according to the petitioner in *Neal* v. *United States*, 516 U. S. 284 (1996), made clear its view that the statute bore that meaning as well. The petitioner argued that we should defer to that new approach. We would have none of it.

> "Were we, for argument's sake, to adopt petitioner's view that the Commission intended the commentary as an interpretation of § 841(b)(1), and that the last sentence of the commentary states the Commission's view that the dose-based method is consistent with the term 'mixture or substance' in the statute, he still would not prevail. The Commission's dose-based method cannot be squared with *Chapman*. . . . In these circumstances, we need not decide what, if any, deference is owed the Commission in order to reject its alleged contrary interpretation. Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law." *Id.*, at 294–295 (citations omitted).

There is, in short, no way to avoid the ossification of federal law that today's opinion sets in motion. What a court says is the law after according *Skidmore* deference will be the

law forever, beyond the power of the agency to change even through rulemaking.

4

And finally, the majority's approach compounds the confusion it creates by breathing new life into the anachronism of *Skidmore*, which sets forth a sliding scale of deference owed an agency's interpretation of a statute that is dependent "upon the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control"; in this way, the appropriate measure of deference will be accorded the "body of experience and informed judgment" that such interpretations often embody, 323 U. S., at 140. Justice Jackson's eloquence notwithstanding, the rule of *Skidmore* deference is an empty truism and a trifling statement of the obvious: A judge should take into account the well-considered views of expert observers.

It was possible to live with the indeterminacy of *Skidmore* deference in earlier times. But in an era when federal statutory law administered by federal agencies is pervasive, and when the ambiguities (intended or unintended) that those statutes contain are innumerable, totality-of-the-circumstances *Skidmore* deference is a recipe for uncertainty, unpredictability, and endless litigation. To condemn a vast body of agency action to that regime (all except rulemaking, formal (and informal?) adjudication, and whatever else might now and then be included within today's intentionally vague formulation of affirmative congressional intent to "delegate") is irresponsible.

II

The Court's pretense that today's opinion is nothing more than application of our prior case law does not withstand analysis. It is, to be sure, impossible to demonstrate that any of our cases contradicts the rule of decision that the

Court prescribes, because the Court prescribes none. More precisely, it at one and the same time (1) renders meaningless its newly announced requirement that there be an affirmative congressional intent to have ambiguities resolved by the administering agency, and (2) ensures that no prior decision can possibly be cited which contradicts that requirement, by simply announcing that all prior decisions according *Chevron* deference exemplify the multifarious ways in which that congressional intent can be manifested: "[A]s significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded," *ante*, at 230–231.[4]

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[4] As a sole, teasing example of those "sometimes" the Court cites *NationsBank of N. C., N. A.* v. *Variable Annuity Life Ins. Co.*, 513 U. S. 251 (1995), explaining in a footnote that our "longstanding precedent" evinced a tradition of great deference to the "'deliberative conclusions'" of the Comptroller of the Currency as to the meaning of the banking laws the Comptroller is charged with enforcing. *Ante*, at 231, n. 13. How it is that a tradition of great judicial deference to the agency head provides affirmative indication of congressional intent to delegate authority to resolve statutory ambiguities challenges the intellect and the imagination. If the point is that Congress must have been aware of that tradition of great deference when it enacted the law at issue, the same could be said of the Customs Service, and indeed of *all* agencies. See, *e. g.*, 4 K. Davis, Administrative Law Treatise §30.08, pp. 237–238 (1958) (describing the "great weight" accorded the "determination[s]" of the Federal Trade Commission (quoting *FTC* v. *Cement Institute*, 333 U. S. 683, 720 (1948)); Report of the Attorney General's Committee on Administrative Procedure, S. Doc. No. 8, 77th Cong., 1st Sess., 90–91 (1941). Indeed, since our opinion in *Chevron* Congress must have been aware that we would defer to *all* authoritative agency resolutions of statutory ambiguities. Needless to say, *NationsBank* itself makes no mention of any such affirmative indication, because it was never the law. The many other cases that contradict the Court's new rule will presumably be explained, like *NationsBank*, as other "modes" of displaying affirmative congressional intent. If a tradition of judicial deference can be called that with a straight face, what cannot be?

The principles central to today's opinion have no antecedent in our jurisprudence. *Chevron*, the case that the opinion purportedly explicates, made no mention of the "relatively formal administrative procedure[s]," *ante*, at 230, that the Court today finds the best indication of an affirmative intent by Congress to have ambiguities resolved by the administering agency. Which is not so remarkable, since *Chevron* made no mention of any *need* to find such an affirmative intent; it said that in the event of statutory ambiguity agency authority to clarify was to be *presumed*. And our cases have followed that prescription.

Six years ago, we unanimously accorded *Chevron* deference to an interpretation of the National Bank Act, 12 U. S. C. §24 Seventh (1988 ed. and Supp. V), contained in a letter to a private party from a Senior Deputy Comptroller of the Currency. See *NationsBank of N. C., N. A.* v. *Variable Annuity Life Ins. Co.*, 513 U. S. 251, 255, 257 (1995). We did so because the letter represented (and no one contested) that it set forth the official position of the Comptroller of the Currency, see *id.*, at 263.

Several cases decided virtually in the wake of *Chevron*, which the Court conveniently ignores, demonstrate that Congress could not (if it was reading our opinions) have acted in reliance on a background assumption that *Chevron* deference would generally be accorded only to agency interpretations arrived at through formal adjudication, notice-and-comment rulemaking, or other procedures assuring "fairness and deliberation," *ante*, at 230. In *FDIC* v. *Philadelphia Gear Corp.*, 476 U. S. 426, 438–439 (1986), we accorded *Chevron* deference to the Federal Deposit Insurance Corporation's interpretation of the statutory term "deposit" reflected in a course of unstructured administrative actions, and gave particular weight to the agency's "contemporaneous understanding" reflected in the response given by an FDIC official to a question asked at a meeting of FDIC and bank officials. It was clear that the position reflected

the official position of the agency, and that was enough to command *Chevron* deference. In *Young* v. *Community Nutrition Institute*, 476 U. S. 974 (1986), the statutory ambiguity at issue pertained to a provision that "the Secretary [of Health and Human Services] shall promulgate regulations limiting the quantity [of any poisonous or deleterious substance added to any food] to such extent as he finds necessary for the protection of public health." The Secretary had regularly interpreted the phrase "to such extent as he finds necessary" as conferring discretion not to issue a rule, rather than merely discretion regarding the quantity that the rule would permit. This interpretation was not, of course, reflected in any formal adjudication, and had not been the subject of any informal rulemaking—it was the Secretary's *understanding* consistently applied in the course of the Department's practice. We accorded it *Chevron* deference, as unquestionably we should have. And in *Mead Corp.* v. *Tilley*, 490 U. S. 714 (1989), a private suit by retirees against their former employer under the Employee Retirement Income Security Act of 1974 (ERISA), we accorded *Chevron* deference to the Pension Benefit Guaranty Corporation's interpretation of § 4044(a) of ERISA, 29 U. S. C. § 1344(a) (1982 ed. and Supp. V), that was reflected only in an *amicus* brief to this Court and in several opinion letters issued without benefit of any prescribed procedures. See 490 U. S., at 722.

I could continue to enumerate cases according *Chevron* deference to agency interpretations not arrived at through formal proceedings—for example, *Pension Benefit Guaranty Corporation* v. *LTV Corp.*, 496 U. S. 633, 642–643, 647–648 (1990) (according *Chevron* deference to the PBGC's interpretation of the requirements for its restoring a terminated plan under § 4047 of ERISA, 29 U. S. C. § 1347 (1988 ed.), which interpretation was reflected in nothing more than the agency's act of issuing a notice of restoration). Suffice it to say that many cases flatly contradict the theory of *Chevron* set forth in today's opinion, and *with one exception*

not a single case can be found with language that supports the theory. That exception, a very recent one, deserves extended discussion.

In *Christensen* v. *Harris County*, 529 U. S. 576 (2000), the Court said the following:

> "[W]e confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." *Id.*, at 587.

This statement was dictum, unnecessary to the Court's holding. Since the Court went on to find that the Secretary of Labor's position "ma[de] little sense" given the text and structure of the statute, *id.*, at 585–586, *Chevron* deference could not have been accorded *no matter what* the conditions for its application. See 529 U. S., at 591 (SCALIA, J., concurring in part and concurring in judgment). It was, moreover, dictum unsupported by the precedent that the Court cited.

The *Christensen* majority followed its above-quoted dictum with a string citation of three cases, none of which sustains its point. In *Reno* v. *Koray*, 515 U. S. 50 (1995), we had no occasion to consider what level of deference was owed the Bureau of Prisons' interpretation of 18 U. S. C. § 3585(b) set forth in an internal agency guideline, because our opinion made clear that we would have independently arrived at the same interpretation on our own, see 515 U. S., at 57–60. And although part of one sentence in *Koray* might be read to suggest that the Bureau's "Program Statemen[t]" should be accorded a measure of deference less than that mandated by *Chevron*, this aside is ultimately inconclusive,

since the sentence ends by observing that the statement was "a 'permissible construction of the statute'" under *Chevron*. 515 U. S., at 61 (quoting *Chevron*, 467 U. S., at 843). In the second case cited, *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244 (1991), it was again unnecessary to our holding whether the agency's interpretation of the statute warranted *Chevron* deference, since the "longstanding . . . 'canon of [statutory] construction'" disfavoring extraterritoriality, 499 U. S., at 248, would have required the same result even if *Chevron* applied. See 499 U. S., at 260 (SCALIA, J., concurring in part and concurring in judgment). While the opinion did purport to accord the Equal Employment Opportunity Commission's informally promulgated interpretation only *Skidmore* deference, it did so because the Court thought itself bound by its pre-*Chevron*, EEOC-specific decision in *General Elec. Co.* v. *Gilbert*, 429 U. S. 125 (1976), which noted that "'Congress, in enacting Title VII, did not'" intend to give the EEOC substantive authority to resolve statutory ambiguities, *Arabian American Oil*, *supra*, at 257 (quoting *Gilbert*, *supra*, at 141). Lastly, in *Martin* v. *Occupational Safety and Health Review Comm'n*, 499 U. S. 144 (1991), the question of the level of deference owed the Secretary of Labor's interpretation of the Occupational Safety and Health Act of 1970, 84 Stat. 1590, as amended, 29 U. S. C. §651 *et seq.*, was neither presented by the case nor considered in our opinion. The only question before the Court was which of two competing interpretations of 29 CFR §1910.1029 (1990)—the Secretary's or the Occupational Safety and Health Review Commission's—should have been deferred to by the court below. See 499 U. S., at 150. The dicta the *Christensen* Court cited, 529 U. S., at 587 (citing 499 U. S., at 157), opined on the measure of deference owed the Secretary's interpretation, not of the statute, but of his own regulations, see generally Manning, Constitutional Structure

and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612 (1996).

To make matters worse, the arguments marshaled by *Christensen* in support of its dictum—its observation that "interpretations contained in policy statements, agency manuals, and enforcement guidelines, all . . . lack the force of law," and its citation of 1 K. Davis & R. Pierce, Administrative Law Treatise §3.5 (3d ed. 1994), 529 U. S., at 587—are not only unpersuasive but bear scant resemblance to the reasoning of today's opinion. Davis and Pierce, and Professor Robert Anthony upon whom they rely, see Anthony, Which Agency Interpretations Should Bind Citizens and the Courts?, 7 Yale J. on Reg. 1 (1990), do indeed set forth the argument I have criticized above, that congressional authorization of informal rulemaking or formal (and perhaps even informal) adjudication somehow bespeaks a congressional intent to "delegate" power to resolve statutory ambiguities. But their analysis does not permit the broad add-ons that the Court's opinion contains—"some other [procedure] indicati[ng] comparable congressional intent," *ante*, at 227, and "we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded," *ante*, at 231.

III

To decide the present case, I would adhere to the original formulation of *Chevron*. "'The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress,'" 467 U. S., at 843 (quoting *Morton* v. *Ruiz*, 415 U. S. 199, 231 (1974)). We accordingly presume—and our precedents have made clear to Congress that we presume—that, absent some clear textual indication to the contrary, "Congress, when it left ambiguity in a statute meant for im-

plementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows," *Smiley*, 517 U. S., at 740–741 (citing *Chevron*, *supra*, at 843–844). *Chevron* sets forth an across-the-board presumption, which operates as a background rule of law against which Congress legislates: Ambiguity means Congress intended agency discretion. Any resolution of the ambiguity by the administering agency that is authoritative—that represents the official position of the agency—must be accepted by the courts if it is reasonable.

Nothing in the statute at issue here displays an intent to modify the background presumption on which *Chevron* deference is based. The Court points, *ante*, at 233, n. 16, to 28 U. S. C. § 2640(a), which provides that, in reviewing the ruling by the Customs Service, the Court of International Trade (CIT) "shall make its determinations upon the basis of the record made before the court." But records are made to determine the facts, not the law. All this provision means is that new evidence may be introduced at the CIT stage; it says nothing about whether the CIT must respect the Customs Service's authoritative interpretation of the law. More significant than § 2640(a), insofar as the CIT's obligation to defer to the Customs Service's legal interpretations is concerned, is § 2639(a)(1), which requires the CIT to accord a "presum[ption of] correct[ness]" to the Customs Service's decision. Another provision cited by the Court, *ante*, at 233, n. 16, is § 2638, which provides that the CIT, "by rule, may consider any new ground in support" of the challenge to the Customs Service's ruling. Once again, it is impossible to see how this has any connection to the degree of deference the CIT must accord the Customs Service's interpretation of its statute. Such "new ground[s]" may be intervening or newly discovered facts, or some intervening

law or regulation that might render the Customs Service's ruling unsound.[5]

There is no doubt that the Customs Service's interpretation represents the authoritative view of the agency. Although the actual ruling letter was signed by only the Director of the Commercial Rulings Branch of Customs Headquarters' Office of Regulations and Rulings, see Pet. for Cert. 47a, the Solicitor General of the United States has filed a brief, cosigned by the General Counsel of the Department of the Treasury, that represents the position set forth in the ruling letter to be the official position of the Customs Service. Cf. *Christensen*, 529 U. S., at 591 (SCALIA, J., concurring in part and concurring in judgment). No one contends that it is merely a "*post hoc* rationalizatio[n]" or an "agency litigating positio[n] wholly unsupported by regulations, rulings, or administrative practice," *Bowen* v. *Georgetown Univ. Hospital*, 488 U. S. 204, 212 (1988).[6]

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[5] The Court also states that "[i]t is hard to imagine" that Congress would have intended courts to defer to classification rulings since "the scheme for CIT review includes a provision that treats classification rulings on par with the Secretary's rulings on 'valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters,'" *ante*, at 232–233 (quoting 28 U. S. C. § 1581(h), and citing § 2639(b)). I fail to see why this is hard to imagine at all. If anything, the fact that "the scheme for CIT review . . . treats classification rulings on par with the Secretary's rulings on" such important matters as "'valuation, rate of duty, . . . restricted merchandise [and] entry requirements,'" *ante*, at 232–233, which often require interpretation of the Nation's customs and tariff statutes, only strengthens the case for according *Chevron* deference to whatever statutory interpretations (as opposed to factual determinations) such rulings embody. In other words, the Court's point is wrong—indeed, the Court's point cuts deeply into its own case—unless the Court believes that the Secretary's *personal* rulings on the legal criteria for imposing particular rates of duty, or for determining restricted merchandise, are entitled to no deference.

[6] The Court's parting shot, that "there would have to be something wrong with a standard that accorded the status of substantive law to every one of 10,000 'official' customs classifications rulings turned out each year from over 46 offices placed around the country at the Nation's entryways," *ante*, at 238, n. 19, misses the mark. I do not disagree. The

There is also no doubt that the Customs Service's interpretation is a reasonable one, whether or not judges would consider it the best. I will not belabor this point, since the Court evidently agrees: An interpretation that was unreasonable would not merit the remand that the Court decrees for consideration of *Skidmore* deference.

IV

Finally, and least importantly, even were I to accept the Court's revised version of *Chevron* as a correct statement

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"authoritativeness" of an agency interpretation does not turn upon whether it has been enunciated by someone who is actually employed by the agency. It must represent the judgment of central agency management, approved at the highest levels. I would find that condition to have been satisfied when, a ruling having been attacked in court, the general counsel of the agency has determined that it should be defended. If one thinks that that does not impart sufficient authoritativeness, then surely the line has been crossed when, as here, the General Counsel of the agency and the Solicitor General of the United States have assured this Court that the position represents the agency's authoritative view. (Contrary to the Court's suggestion, there would be nothing bizarre about the fact that this latter approach would entitle the ruling to deference here, though it would not have been entitled to deference in the lower courts. Affirmation of the official agency position before this court—if that is thought necessary—is no different from the agency's issuing a new rule after the Court of Appeals determination. It establishes a new legal basis for the decision, which this Court must take into account (or remand for that purpose), even though the Court of Appeals could not. See *Thorpe* v. *Housing Authority of Durham*, 393 U. S. 268, 282 (1969); see also *United States* v. *Schooner Peggy*, 1 Cranch 103 (1801).)

The *authoritativeness* of the agency ruling may not be a bright-line standard—but it is infinitely brighter than the line the Court asks us to draw today, between a statute such as the one at issue in *NationsBank* that (according to the Court) *does* display an "affirmative intent" to "delegate" interpretive authority, and innumerable indistinguishable statutes that (according to the Court) do *not*. And, most important of all, it is a line that focuses attention on the right question: not whether Congress "affirmatively intended" to delegate interpretive authority (if it entrusted administration of the statute to an agency, it did, because that is how our system works); but whether it is truly the agency's considered view, or just the opinions of some underlings, that are at issue.

of the law, I would still accord deference to the tariff classification ruling at issue in this case. For the case is indistinguishable, in that regard, from *NationsBank of N. C., N. A.* v. *Variable Annuity Life Ins. Co.*, 513 U. S. 251 (1995), which the Court acknowledges as an instance in which *Chevron* deference is warranted notwithstanding the absence of formal adjudication, notice-and-comment rulemaking, or comparable "administrative formality," *ante*, at 231. Here, as in *NationsBank*, there is a tradition of great deference to the opinions of the agency head, *ante*, at 231, n. 13. Just two Terms ago, we observed:

> "As early as 1809, Chief Justice Marshall noted in a customs case that '[i]f the question had been doubtful, the court would have respected the uniform construction which it is understood has been given by the treasury department of the United States upon similar questions.' *United States* v. *Vowell*, 5 Cranch 368, 372. See also P. Reed, The Role of Federal Courts in U. S. Customs & International Trade Law 289 (1997) ('Consistent with the *Chevron* methodology, and as has long been the rule in customs cases, customs regulations are sustained if they represent reasonable interpretations of the statute'); cf. *Zenith Radio Corp.* v. *United States*, 437 U. S. 443, 450 (1978) (deferring to the Treasury Department's 'longstanding and consistent administrative interpretation' of the countervailing duty provision of the Tariff Act." *United States* v. *Haggar Apparel Co.*, 526 U. S. 380, 393 (1999).

And here, as in *NationsBank*, the agency interpretation in question is officially that of the agency head. Consequently, even on the Court's own terms, the Customs ruling at issue in this case should be given *Chevron* deference.

* * *

For the reasons stated, I respectfully dissent from the Court's judgment. I would uphold the Customs Service's construction of Subheading 4820.10.20 of the Harmonized Tariff Schedule of the United States, 19 U. S. C. § 1202, and would reverse the contrary decision of the Court of Appeals. I dissent even more vigorously from the reasoning that produces the Court's judgment, and that makes today's decision one of the most significant opinions ever rendered by the Court dealing with the judicial review of administrative action. Its consequences will be enormous, and almost uniformly bad.

Syllabus

IDAHO *v.* UNITED STATES ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 00–189. Argued April 23, 2001—Decided June 18, 2001

This suit involves a dispute between the United States and Idaho over the ownership of submerged lands underlying portions of Lake Coeur d'Alene and the St. Joe River. The Coeur d'Alene Tribe once inhabited vast acreage in and about what is now Idaho, and traditionally used Lake Coeur d'Alene and the St. Joe River for food, fiber, transportation, recreation, and cultural activities. In 1873, the Tribe agreed to relinquish for compensation all claims to its aboriginal lands outside the bounds of a specified reservation that included part of the river and virtually all of the lake. The agreement required congressional approval, but President Grant set the land aside in an 1873 Executive Order, which set the reservation's northern boundary directly across the lake. An 1883 Government survey indicated that the reservation included submerged lands. When Congress neither ratified the agreement nor compensated the Tribe, the Tribe petitioned the Government to make a proper treaty and Congress authorized negotiations. In 1887, the Tribe agreed to cede its rights to all land except that within the Executive Order reservation, and the Government promised to compensate the Tribe and agreed to hold the land forever as Indian land. Still, Congress did not ratify the agreement. In 1888, the Interior Secretary responded to a Senate enquiry about the reservation's boundaries, reporting that the reservation appeared to embrace all but a small fragment of the lake's navigable waters and that the St. Joe River flowed through the reservation. Also in 1888, Congress approved a railroad right-of-way that crossed the reservation's navigable waters, but directed that the Tribe's consent be obtained and that the Tribe be compensated. Responding to a growing desire to obtain for the public an interest in portions of the reservation, Congress authorized negotiations that produced a new agreement in 1889, in which the Tribe agreed to cede the reservation's northern portion, including two-thirds of the lake, for compensation. In 1890, the Senate passed a bill ratifying the 1887 and 1889 agreements, but while the bill was pending in the House, Congress passed the Idaho Statehood Act, admitting Idaho to the Union. In 1891, Congress ratified the 1887 and 1889 agreements. The United States initiated this action against Idaho to quiet title in the United States, in trust for the Tribe, to the sub-

merged lands within the current reservation. The Tribe intervened to assert its interest in those lands, and Idaho counterclaimed to quiet title in its favor. The District Court quieted title in the United States as trustee, and the Tribe as beneficiary, to the bed and banks of the lake and the river within the reservation. The Ninth Circuit affirmed.

Held: The National Government holds title, in trust for the Tribe, to lands underlying portions of Lake Coeur d'Alene and the St. Joe River. Pp. 272–281.

(a) Armed with the strong presumption against defeat of a State's title to land under navigable waters, *United States* v. *Alaska*, 521 U. S. 1, 34, the Court looks to Congress's declarations and intent when resolving conflicts over submerged lands claimed to be reserved or conveyed by the United States before statehood, *e. g.*, *id.*, at 36. The two-step enquiry used in reservation cases asks whether Congress intended to include submerged lands within the federal reservation, and, if so, whether Congress intended to defeat the future State's title to those lands. *Ibid.* Where, as here, the Executive Branch initially reserved the land, the two-step test is satisfied when an Executive reservation clearly includes submerged lands, and Congress recognizes that reservation in a way that demonstrates its intent to defeat state title. *Id.*, at 41–46, 55–61. Here, Idaho has conceded that the Executive Branch intended, or interpreted, the 1873 Executive Order reservation to include submerged lands. Pp. 272–274.

(b) Congress recognized the full extent of the Executive Order reservation and it intended to bar passage to Idaho of title to the submerged lands at issue. Idaho's concession, in the Ninth Circuit, that the Executive Order reservation included submerged lands and that Congress was on notice regarding the scope of the reservation was prudent in light of the District Court's findings of facts. That court concluded that the submerged lands and related water rights had been continuously important to the Tribe throughout the period prior to congressional action confirming the reservation and granting Idaho statehood, and that the Federal Government could only achieve its goals of promoting settlement in the Tribe's aboriginal area, avoiding hostilities with the Tribe, and extinguishing aboriginal title by agreeing to a reservation that included the submerged lands. That is the background of the 1873 Executive Order's inclusion of such lands, which in turn were the subject of the Senate's 1888 request to the Interior Secretary, whose response was consistent with the 1883 survey results. The manner in which Congress then proceeded to deal with the Tribe shows clearly that preservation of the reservation's land, absent contrary agreement with the Tribe, was central to Congress's complementary objectives

Syllabus

of dealing with pressures of white settlement and establishing the reservation by permanent legislation. Congress made it expressly plain that its object was to obtain tribal interests only by tribal consent. When it sought to extinguish aboriginal title to lands outside the 1873 reservation and to reduce the reservation's size, it did so by authorizing negotiations with the Tribe to cede title for compensation. It also honored the reservation's boundaries by requiring that the Tribe be compensated for the railroad right-of-way. The intent was that anything not consensually ceded by the Tribe would remain for the Tribe's benefit, an objective flatly at odds with Idaho's view that Congress meant to transfer the balance of submerged lands to the State in what would have amounted to an act of bad faith accomplished by unspoken operation of law. Idaho's position is also at odds with later manifestations of congressional understanding that statehood had not affected the submerged lands. Pp. 275–281.

210 F. 3d 1067, affirmed.

SOUTER, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, GINSBURG, and BREYER, JJ., joined. REHNQUIST, C. J., filed a dissenting opinion, in which SCALIA, KENNEDY, and THOMAS, JJ., joined, *post*, p. 281.

Steven W. Strack, Deputy Attorney General of Idaho, argued the cause for petitioner. With him on the briefs were *Alan G. Lance*, Attorney General, and *Clive J. Strong*, Deputy Attorney General.

Raymond C. Givens argued the cause for respondent Coeur d'Alene Tribe. With him on the brief were *Brian J. Cleary* and *Joseph D. Kearney*. *David C. Frederick* argued the cause for the United States. With him on the brief were *Acting Solicitor General Underwood*, *Acting Assistant Attorney General Cruden*, *Deputy Solicitor General Kneedler*, *James C. Kilbourne*, and *Hank Meshorer*.*

**Dennis Molenaar*, *Jerry K. Boyd*, *Douglas P. Payne*, and *Nancy A. Wolff* filed a brief of *amici curiae* urging reversal for Benewah County et al.

A brief of *amici curiae* was filed for the State of California et al. by *Bill Lockyer*, Attorney General of California, *Richard M. Frank*, Chief Assistant Attorney General, and *J. Matthew Rodriquez* and *Jan S. Stevens*, Assistant Attorneys General, and by the Attorneys General for their

JUSTICE SOUTER delivered the opinion of the Court.

The United States brought this quiet title action against the State of Idaho. The question is whether the National Government holds title, in trust for the Coeur d'Alene Tribe, to lands underlying portions of Lake Coeur d'Alene and the St. Joe River. We hold that it does.

I

The Coeur d'Alene Tribe once inhabited more than 3.5 million acres in what is now northern Idaho and northeastern Washington, including the area of Lake Coeur d'Alene and the St. Joe River. 95 F. Supp. 2d 1094, 1095–1096, 1099–1100 (Idaho 1998).[1] Tribal members traditionally used the lake and its related waterways for food, fiber, transportation, recreation, and cultural activities. *Id.*, at 1099–1102. The Tribe depended on submerged lands for everything from water potatoes harvested from the lake to fish weirs and traps anchored in riverbeds and banks. *Id.*, at 1100.

Under an 1846 treaty with Great Britain, the United States acquired title to the region of Lake Coeur d'Alene, see Treaty in Regard to Limits Westward of the Rocky Mountains, 9 Stat. 869, subject to the aboriginal right of possession held by resident tribes, see generally *Oneida Indian Nation of N. Y.* v. *County of Oneida*, 414 U. S. 661, 667 (1974); F. Cohen, Handbook of Federal Indian Law 486–493 (1982 ed.). In 1867, in the face of immigration into the Tribe's aboriginal territory, 95 F. Supp. 2d, at 1102, President Johnson issued an Executive Order setting aside a reservation of comparatively modest size, although the Tribe was

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respective States as follows: *Bill Pryor* of Alabama, *Bruce M. Botelho* of Alaska, *Mark Pryor* of Arkansas, *Wayne Stenehjem* of North Dakota, *Hardy Myers* of Oregon, *Mark W. Barnett* of South Dakota, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, *Christine O. Gregoire* of Washington, and *Gay Woodhouse* of Wyoming.

[1] Petitioner, the State of Idaho, did not challenge the District Court's factual findings on appeal. See 210 F. 3d 1067, 1070 (CA9 2000).

apparently unaware of this action until at least 1871, when it petitioned the Government to set aside a reservation, *id.*, at 1102–1103. The Tribe found the 1867 boundaries unsatisfactory, due in part to their failure to make adequate provision for fishing and other uses of important waterways. When the Tribe petitioned the Commissioner of Indian Affairs a second time, it insisted on a reservation that included key river valleys because "we are not as yet quite up to living on farming" and "for a while yet we need have some hunting and fishing." App. 27.

Following further negotiations, the Tribe in 1873 agreed to relinquish (for compensation) all claims to its aboriginal lands outside the bounds of a more substantial reservation that negotiators for the United States agreed to "set apart and secure" "for the exclusive use of the Coeur d'Alene Indians, and to protect . . . from settlement or occupancy by other persons." *Id.*, at 33. The reservation boundaries described in the agreement covered part of the St. Joe River (then called the St. Joseph), and all of Lake Coeur d'Alene except a sliver cut off by the northern boundary. *Id.*, at 33–34; 95 F. Supp. 2d, at 1095–1096.

Although by its own terms the agreement was not binding without congressional approval, App. 36–37, later in 1873 President Grant issued an Executive Order directing that the reservation specified in the agreement be "withdrawn from sale and set apart as a reservation for the Cur d'Alène Indians." Exec. Order of Nov. 8, 1873, reprinted in 1 C. Kapler, Indian Affairs: Laws and Treaties 837 (1904). The 1873 Executive Order set the northern boundary of the reservation directly across Lake Coeur d'Alene, which, the District Court found, was contrary "to the usual practice of meandering a survey line along the mean high water mark." 95 F. Supp. 2d, at 1108; App. 14, 20 (expert trial testimony).[2]

[2] Although the State did not challenge the District Court's factual findings below, it claims in its reply brief to us that it was "commonplace" for reservation boundaries to cross navigable waters. Reply Brief for

An 1883 Government survey fixed the reservation's total area at 598,499.85 acres, which the District Court found necessarily "included submerged lands within the reservation boundaries." 95 F. Supp. 2d, at 1108.

As of 1885, Congress had neither ratified the 1873 agreement nor compensated the Tribe. This inaction prompted the Tribe to petition the Government again, to "make with us a proper treaty of peace and friendship . . . by which your petitioners may be properly and fully compensated for such portion of their lands not now reserved to them; [and] that their present reserve may be confirmed to them." App. 350–351. In response, Congress authorized new negotiations to obtain the Tribe's agreement to cede land outside the borders of the 1873 reservation. Act of May 15, 1886, ch. 333, 24 Stat. 44. In 1887, the Tribe agreed to cede

> "all right, title, and claim which they now have, or ever had, to all lands in said Territories [Washington, Idaho, and Montana] and elsewhere, except the portion of land within the boundaries of their present reservation in the Territory of Idaho, known as the Coeur d'Alene Reservation." App. 378.

The Government, in return, promised to compensate the Tribe, and agreed that

> "[i]n consideration of the foregoing cession and agreements . . . the Coeur d'Alene Reservation shall be held forever as Indian land and as homes for the Coeur d'Alene Indians . . . and no part of said reservation shall ever be sold, occupied, open to white settlement,

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Petitioner 9. Ultimately, this factual dispute is of little consequence; the District Court found that the boundary and acreage calculations showed the understanding of the Government and the Tribe that submerged lands were included, 95 F. Supp. 2d, at 1108, and the State conceded on appeal that "[c]ertainly, . . . by 1888, the executive branch had construed the 1873 Coeur d'Alene Reservation as including submerged lands." Opening Brief for Appellant in No. 98–35831 (CA9), p. 17.

> or otherwise disposed of without the consent of the Indians residing on said reservation." *Id.*, at 379.

As before, the agreement was not binding on either party until ratified by Congress. *Id.*, at 382.

In January 1888, not having as yet ratified any agreement with the Tribe, the Senate expressed uncertainty about the extent of the Tribe's reservation and adopted a resolution directing the Secretary of the Interior to "inform the Senate as to the extent of the present area and boundaries of the Coeur d'Alene Indian Reservation in the Territory of Idaho," and specifically, "whether such area includes any portion, and if so, about how much of the navigable waters of Lake Coeur d'Alene, and of Coeur d'Alene and St. Joseph Rivers." S. Misc. Doc. No. 36, 50th Cong., 1st Sess., 1 (1888). The Secretary responded in February 1888 with a report of the Commissioner of Indian Affairs, stating that "the reservation appears to embrace all the navigable waters of Lake Coeur d'Alene, except a very small fragment cut off by the north boundary of the reservation," and that "[t]he St. Joseph River also flows through the reservation." S. Exec. Doc. No. 76, 50th Cong., 1st Sess., 3 (1888). Based largely, it appears, on this report, Idaho conceded in the Court of Appeals (as it does here) that the 1873 Executive Order reservation included submerged lands. See Opening Brief for Appellant in No. 98–35831 (CA9), p. 17 ("Certainly, the State concedes that by 1888, the executive branch had construed the 1873 Coeur d'Alene Reservation as including submerged lands"); Brief for Petitioner 17.

In May 1888, shortly after receiving the Secretary's report, Congress passed an Act granting a right-of-way to the Washington and Idaho Railroad Company "for the extension of its railroad through the lands in Idaho Territory set apart for the use of the Coeur d'Alene Indians by executive order, commonly known as the Coeur d'Alene Indian Reservation." Act of May 30, 1888, ch. 336, § 1, 25 Stat. 160. Notably, the Act directed that the Tribe's consent be obtained and that

the Tribe alone (no one else being mentioned) be compensated for the right-of-way, a part of which crossed over navigable waters within the reservation. *Id.*, § 3, 25 Stat. 161; see also Reply Brief for Petitioner 16.

Congress was not prepared to ratify the 1887 agreement, however, owing to a growing desire to obtain for the public not only any interest of the Tribe in land outside the 1873 reservation, but certain portions of the reservation itself. The House Committee on Indian Affairs later recalled that the 1887 agreement was not promptly ratified for

> "sundry reasons, among which was a desire on the part of the United States to acquire an additional area, to wit, a certain valuable portion of the reservation specially dedicated to the exclusive use of said Indians under an Executive order of 1873, and which portions of said lands, situate[d] on the northern end of said reservation, is valuable and necessary to the citizens of the United States for sundry reasons. It contains numerous, extensive, and valuable mineral ledges. It contains large bodies of valuable timber. . . . It contains a magnificent sheet of water, the Coeur d'Alene Lake . . . ." H. R. Rep. No. 1109, 51st Cong., 1st Sess., 4 (1890).

But Congress did not simply alter the 1873 boundaries unilaterally. Instead, the Tribe was understood to be entitled beneficially to the reservation as then defined, and the 1889 Indian Appropriations Act included a provision directing the Secretary of the Interior "to negotiate with the Coeur d'Alene tribe of Indians," and, specifically, to negotiate "for the purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell." Act of Mar. 2, 1889, ch. 412, § 4, 25 Stat. 1002. Later that year, the Tribe and Government negotiators reached a new agreement under which the Tribe would cede

the northern portion of the reservation, including approximately two-thirds of Lake Coeur d'Alene, in exchange for $500,000. App. 198; see also 95 F. Supp. 2d, at 1113. The new boundary line, like the old one, ran across the lake, and General Simpson, a negotiator for the United States, reassured the Tribe that "you still have the St. Joseph River and the lower part of the lake." App. 183. And, again, the agreement was not to be binding on either party until both it and the 1887 agreement were ratified by Congress. *Id.*, at 199.

On June 7, 1890, the Senate passed a bill ratifying both the 1887 and 1889 agreements. S. 2828, 51st Cong., 1st Sess. (1890); 21 Cong. Rec. 5769–5770 (1890). On June 10, the Senate bill was referred to the House, where a parallel bill had already been reported by the House Committee on Indian Affairs. H. R. Rep. No. 1109, 51st Cong., 1st Sess. (1890); see 21 Cong. Rec. 2775 (1890).

On July 3, 1890, while the Senate bill was under consideration by the House Committee on Indian Affairs, Congress passed the Idaho Statehood Act, admitting Idaho into the Union "on an equal footing with the original States," Act of July 3, 1890, ch. 656, 26 Stat. 215. The Statehood Act "accepted, ratified, and confirmed" the Idaho Constitution, *ibid.*, which "forever disclaim[ed] all right and title to . . . all lands lying within [Idaho] owned or held by any Indians or Indian tribes" and provided that "until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States," Idaho Const., Art. XXI, § 19 (1890).

A little over a month later, on August 19, 1890, the House Committee on Indian Affairs reported that the Senate bill ratifying the 1887 and 1889 agreements was identical to the House bill that it had already recommended. H. R. Rep. No. 2988, 51st Cong., 1st Sess. (1890). On March 3, 1891, Congress "accepted, ratified, and confirmed" both the 1887

and 1889 agreements with the Tribe. Act of Mar. 3, 1891, ch. 543, §§ 19, 20, 26 Stat. 1027, 1029. The Act also directed the Secretary of the Interior to convey to one Frederick Post a "portion of [the] reservation," *id.*, at 1031, that the Tribe had purported to sell to Post in 1871.[3] The property, located on the Spokane River and known as Post Falls, was described as "all three of the river channels and islands, with enough land on the north and south shores for water-power and improvements." *Ibid.*

In 1894, Congress approved yet another agreement with the Tribe, this time for the cession of a lakeside townsite called Harrison, within the boundary of the ratified reservation. Act of Aug. 15, 1894, ch. 290, 28 Stat. 322, agreement reprinted in App. 389; see also 95 F. Supp. 2d, at 1117. The agreement with the Tribe described the cession as covering "all the land" embraced within a tract that included a portion of the lake. App. 392. Like the earlier railroad cession, this one was subject to compensation to the Tribe and no one else.

The United States, acting in its own capacity and as trustee for the Tribe, initiated this action against the State of Idaho to quiet title (in the United States, to be held for the use and benefit of the Tribe) to the submerged lands within the exterior boundaries of the Tribe's current reservation, which encompass the lower third of Lake Coeur d'Alene and part of the St. Joe River.[4] The Tribe inter-

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[3] See generally, *e. g.*, *Oneida Indian Nation of N. Y.* v. *County of Oneida*, 414 U. S. 661, 667–668 (1974) (under common law and various Nonintercourse Acts, Indian title can only be extinguished with federal consent).

[4] Because this action was brought by the United States, it does not implicate the Eleventh Amendment bar raised when the Tribe pressed its own claim to the submerged lands in *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U. S. 261 (1997). See *Arizona* v. *California*, 460 U. S. 605, 614 (1983).

The United States's complaint was apparently motivated by Idaho's issuance of permits for the construction of "docks, piers, floats, pilings, breakwaters, boat ramps and other such aids to navigation within the

vened to assert its interest in the submerged lands, and Idaho counterclaimed, seeking to quiet title in its own favor. *Ibid.* Following a 9-day trial, the District Court quieted title "in favor of the United States, as trustee, and the Coeur d'Alene Tribe of Idaho, as the beneficially interested party of the trusteeship, to the bed and banks of the Coeur d'Alene Lake and the St. Joe River lying within the current boundaries of the Coeur d'Alene Indian Reservation." 95 F. Supp. 2d, at 1117. The Court of Appeals for the Ninth Circuit affirmed. 210 F. 3d 1067 (2000). We granted certiorari, 531 U. S. 1050 (2000), and we now affirm.

II

Due to the public importance of navigable waterways, ownership of the land underlying such waters is "strongly identified with the sovereign power of government." *Montana* v. *United States*, 450 U. S. 544, 552 (1981). See generally *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U. S. 261, 284 (1997); *United States* v. *Alaska*, 521 U. S. 1, 5 (1997). In order to allow new States to enter the Union on an "equal footing" with the original States with regard to this important interest, "the United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory . . . as held for the ultimate benefit of future States." *United States* v. *Holt State Bank*, 270 U. S. 49, 55 (1926); see also *Shively* v. *Bowlby*, 152 U. S. 1, 48–50 (1894). Therefore, in contrast to the law governing surface land held by the United States, see *Scott* v. *Lattig*, 227 U. S. 229, 244 (1913), the default rule is that title to land under navigable waters passes from the United States to a newly admitted State. *Shively*, *supra*, at 26–50. Specifically, although Congress has the power before statehood to convey land beneath navigable waters, and to reserve such land for the United States, "'[a] court

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southern one-third of Coeur d'Alene Lake." Complaint in CIV94–0328–N–EJL (D. Idaho), pp. 6–7.

deciding a question of title to the bed of navigable water must . . . begin with a strong presumption' against defeat of a State's title." *Alaska, supra,* at 34 (quoting *Montana, supra,* at 552).

Armed with that presumption, we have looked to Congress's declarations and intent when we have had to resolve conflicts over submerged lands claimed to have been reserved or conveyed by the United States before statehood. *Alaska, supra,* at 36 ("Whether title to submerged lands rests with a State, of course, is ultimately a matter of federal intent"); *Utah Div. of State Lands* v. *United States,* 482 U. S. 193, 201–202 (1987); *Montana, supra,* at 550–557; *Holt State Bank, supra,* at 57–59; *Alaska Pacific Fisheries* v. *United States,* 248 U. S. 78, 87–90 (1918); *Shively, supra,* at 48–51.

The issue of congressional intent is refined somewhat when submerged lands are located within a tract that the National Government has dealt with in some special way before statehood, as by reserving lands for a particular national purpose such as a wildlife refuge or, as here, an Indian reservation. Because reserving submerged lands does not necessarily imply the intent "to defeat a future State's title to the land," *Utah Div. of State Lands, supra,* at 202, we undertake a two-step enquiry in reservation cases. We ask whether Congress intended to include land under navigable waters within the federal reservation and, if so, whether Congress intended to defeat the future State's title to the submerged lands. *Alaska, supra,* at 36; *Utah, supra,* at 202.

Our most recent case of this sort, *United States* v. *Alaska, supra,* addressed two parcels of land initially reserved not by Congress but, as here, by the Executive Branch. We explained that the two-step test of congressional intent is satisfied when an Executive reservation clearly includes submerged lands, and Congress recognizes the reservation in a way that demonstrates an intent to defeat state title. *Id.,* at 41–46, 55–61. We considered whether Congress was

on notice that the Executive reservation included submerged lands, see *id.*, at 42, 45, 56, and whether the purpose of the reservation would have been compromised if the submerged lands had passed to the State, *id.*, at 42–43, 45–46, 58. Where the purpose would have been undermined, we explained, "[i]t is simply not plausible that the United States sought to reserve only the upland portions of the area," *id.*, at 39–40.

Here, Idaho has conceded that "the executive branch had intended, or by 1888 had interpreted, the 1873 Executive Order Reservation to include submerged lands." Brief for Petitioner 17. The concession is a sound one. A right to control the lakebed and adjacent waters was traditionally important to the Tribe, which emphasized in its petition to the Government that it continued to depend on fishing. Cf. *Montana*, *supra*, at 556 (finding no intent to include submerged lands within a reservation where the tribe did not depend on fishing or use of navigable water). The District Court found that the acreage determination of the reserved area in 1883 necessarily included the area of the lakebed within the unusual boundary line crossing the lake from east to west. Cf. *Alaska*, *supra*, at 39 (concluding that a boundary following the ocean side of offshore islands necessarily embraced submerged lands shoreward of the islands). In light of those findings and Idaho's concession, the parties here concentrate on the second question, of Congress's intent to defeat Idaho's title to the submerged lands.[5]

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[5] The District Court and Court of Appeals accepted the United States's position that it had reserved the submerged lands, and that Congress intended that reservation to defeat Idaho's title. They did not reach the Tribe's alternative theory that, notwithstanding the scope of any reservation, the Tribe retained aboriginal title to the submerged lands, which cannot be extinguished without explicit action by Congress, see *Oneida Indian Nation*, 414 U. S., at 667–668; cf. *United States* v. *Winans*, 198 U. S. 371, 381 (1905) (explaining that a treaty ceding some aboriginal lands to the United States and setting apart other lands as a reservation "was not a grant of rights to the Indians, but a grant of rights from

In the Court of Appeals, Idaho also conceded one point covered in this second part of the enquiry. It agreed that after the Secretary of the Interior's 1888 report that the reservation embraced nearly "all the navigable water of Lake Coeur d'Alene," S. Exec. Doc. No. 76, 50th Cong., 1st Sess., at 3, Congress was on notice that the Executive Order reservation included submerged lands. Opening Brief for Appellant in No. 98–35831 (CA9), at 11 ("[Congress was] informed that the Coeur d'Alene Reservation embraced submerged lands"). Again, Idaho's concession was prudent in light of the District Court's findings of facts. 95 F. Supp. 2d, at 1114 ("The evidence shows that prior to Idaho's statehood, Congress was on notice that the Executive Order of 1873 reserved for the benefit of the Tribe the submerged lands within the boundaries of the Coeur d'Alene Reservation").

The District Court did not merely impute to Congress knowledge of the land survey, but also explained how the submerged lands and related water rights had been continuously important to the Tribe throughout the period prior to congressional action confirming the reservation and granting Idaho statehood. And the District Court made the following findings about the period preceding negotiations authorized by Congress:

> "The facts demonstrate that an influx of non-Indians into the Tribe's aboriginal territory prompted the Federal Government to negotiate with the Coeur d'Alenes in an attempt to confine the Tribe to a reservation and to obtain the Tribe's release of its aboriginal lands for settlement. Before it would agree to these conditions, however, the Tribe demanded an enlarged reservation that included the Lake and rivers. Thus, the Federal Government could only achieve its goals of promoting

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them—a reservation of those not granted"). The Tribe does not press its unextinguished-aboriginal-title argument here. See Brief for Respondent Coeur d'Alene Tribe 25, n. 12.

> settlement, avoiding hostilities and extinguishing aboriginal title by agreeing to a reservation that included the submerged lands." *Id.*, at 1107.[6]

This, in summary, was the background for the 1873 Executive Order's inclusion of submerged lands, which in turn were the subject of the 1888 request by the Senate to the Secretary of the Interior for advice about the Tribe's rights over the "navigable waters of Lake Coeur d'Alene and the Coeur d'Alene and St. Joseph Rivers," S. Misc. Doc. No. 36, 50th Cong., 1st Sess., at 1. As noted, the Secretary answered in the affirmative, S. Exec. Doc. No. 76, 50th Cong., 1st Sess., at 3, consistently with the survey indicating that the submerged lands were within the reservation. Thus, the District Court remarked that it would be difficult to imagine circumstances that could have made it more plain to Congress that submerged lands were within the reservation. 95 F. Supp. 2d, at 1114.

The manner in which Congress then proceeded to deal with the Tribe shows clearly that preservation of the land within the reservation, absent contrary agreement with the Tribe, was central to Congress's complementary objectives of dealing with pressures of white settlement and establishing the reservation by permanent legislation. The Tribe had shown its readiness to fight to preserve its land rights when in 1858 it defeated a force of the United States military, which it misunderstood as intending to take aboriginal lands. See H. R. Rep. No. 1109, 51st Cong., 1st Sess., at 2–3. The concern with hostility arose again in 1873 before the reservation boundaries were established, when a surveyor on the

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[6] See also Commissioner of Indian Affairs, Annual Report (1873), reprinted in App. 45 (explaining that Tribe was dissatisfied with a previous reservation and that the 1873 agreement was required "[f]or the purpose of extinguishing [the Tribe's] claim to all the tract of country claimed by them"). See generally *Montana* v. *United States*, 450 U. S. 544, 556 (1981) (creation of Indian reservation is appropriate public purpose justifying defeat of state title to submerged lands).

scene had warned the Surveyor General that "[s]hould the fisheries be excluded there will in my opinion be trouble with these Indians." App. 30.

Hence, although the goal of extinguishing aboriginal title could have been achieved by congressional fiat, see *Tee-Hit-Ton Indians* v. *United States*, 348 U. S. 272, 279–282 (1955), and Congress was free to define the reservation boundaries however it saw fit, the goal of avoiding hostility seemingly could not have been attained without the agreement of the Tribe. Congress in any event made it expressly plain that its object was to obtain tribal interests only by tribal consent. When in 1886 Congress took steps toward extinguishing aboriginal title to all lands outside the 1873 boundaries, it did so by authorizing negotiation of agreements ceding title for compensation. Soon after that, when Congress decided to seek a reduction in the size of the 1873 reservation itself, the Secretary of the Interior advised the Senate against fiddling with the scope of the reservation without the Tribe's agreement. The report of February 1888 likewise urged that any move to diminish the reservation "should be done, if done at all, with the full and free consent of the Indians, and they should, of course, receive proper compensation for any land so taken." App. 129. Accordingly, after receiving the Secretary's report, Congress undertook in the 1889 Act to authorize negotiation with the Tribe for the consensual, compensated cession of such portions of the Tribe's reservation "as such tribe shall consent to sell," Act of Mar. 2, 1889, ch. 412, § 4, 25 Stat. 1002. In the meantime it honored the reservation's recently clarified boundaries by requiring that the Tribe be compensated for the Washington and Idaho Railroad Company right-of-way, Act of May 30, 1888, ch. 336, § 1, 25 Stat. 160.

The facts, including the provisions of Acts of Congress in 1886, 1888, and 1889, thus demonstrate that Congress understood its objective as turning on the Tribe's agreement to the abrogation of any land claim it might have and to any

reduction of the 1873 reservation's boundaries. The explicit statutory provisions requiring agreement of the Tribe were unchanged right through to the point of Congress's final 1891 ratification of the reservation, in an Act that of course contained no cession by the Tribe of submerged lands within the reservation's outer boundaries. Nor, it should be added, is there any hint in the evidence that delay in final passage of the ratifying Act was meant to pull a fast one by allowing the reservation's submerged lands to pass to Idaho under a legal presumption, by virtue of the Statehood Act approved eight months before Congress took final action on the reservation. There is no evidence that the Act confirming the reservation was delayed for any reason but comparison of the respective House and Senate bills, to assure that they were identical prior to the House's passage of the Senate version.[7]

The record thus answers the State's argument that, because the 1889 Act indicates that Congress sought to obtain portions of the reservation "valuable chiefly for minerals and timber," Congress was not necessarily thinking one thing or another about the balance of the reservation land. Reply Brief for Petitioner 6–7; see also Tr. of Oral Arg. 12–13. The argument simply ignores the evidence that Congress did know that the reservation included submerged lands, and that it authorized the reservation's modification solely by agreement. The intent, in other words, was that anything not consensually ceded by the Tribe would remain for the Tribe's benefit, an objective flatly at odds with Idaho's view that Congress meant to transfer the balance

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[7] Given the preceding discussion of, among other things, the earlier congressional Acts, it should go without saying that this reference to the fact that the Senate passed the ratification Act before statehood is not intended to suggest that the Senate action constituted the enactment of an expression of intent on behalf of the whole Congress, let alone that it was sufficient of itself to defeat Idaho's title to the submerged lands. But cf. *post*, at 285 (REHNQUIST, C. J., dissenting).

of submerged lands to the State in what would have amounted to an act of bad faith accomplished by unspoken operation of law. Indeed, the implausibility of the State's current position is underscored by the fact that it made a contrary argument in the Court of Appeals, where it emphasized the District Court's finding that the 1889 Act was an authorization "to negotiate with the Tribe for a release of the submerged lands," and recognized that "[Congress was] informed that the Coeur d'Alene Reservation embraced submerged lands." Opening Brief for Appellant in No. 98–35831 (CA9), at 11, 31.

Idaho's position is at odds not only with evidence of congressional intent before statehood, but also with later congressional understanding that statehood had not affected the submerged lands in question. Eight months after passing the Statehood Act, Congress ratified the 1887 and 1889 agreements in their entireties (including language in the 1887 agreement that "the Coeur d'Alene Reservation shall be held forever as Indian land"), with no signal that some of the land over which the parties to those agreements had negotiated had passed in the interim to Idaho. The ratification Act suggested in a further way Congress's understanding that the 1873 reservation's submerged lands had not passed to the State, by including a provision confirming the Tribe's sale of river channels to Frederick Post. Confirmation would have been beyond Congress's power if title to the submerged riverbed had already passed to the State.[8] Finally, the Act of Congress ceding the portion of

[8] The State says that the conveyance to Post included land that was outside the boundary of the 1873 reservation. Reply Brief for Petitioner 18. That merely suggests the possibility that Congress intended to defeat the State's title to even more territory than the United States is claiming here.

The State also hypothesizes that the relevant portions of the Spokane River may not have been considered navigable at the time of the conveyance, *ibid.*, in which case the equal footing doctrine would not apply and the conveyance would say nothing about Congress's intent with regard to

reservation land for the townsite of Harrison confirms Congress's understanding that the lakebed within the reservation's boundaries was part of the reservation. Only three years after the Act confirming the reservation, the townsite cession was treated just as the right-of-way for the railroad had been treated before statehood. The Tribe (and no one else) was compensated for a cession whose bounds suggested inclusion of submerged lands; the boundary lines did not stop at the water's edge and meander the entire shore, but continued into the area of the lake to encompass submerged territory that the National Government simply could not have conveyed if it had passed to Idaho at the time of statehood.[9]

In sum, Congress undertook to negotiate with the Coeur d'Alene Tribe for reduction in the territory of an Executive Order reservation that Idaho concedes included the submerged lands at issue here. Congress was aware that the submerged lands were included and clearly intended to redefine the area of the reservation that covered them only by consensual transfer, in exchange for the guarantee that the Tribe would retain the remainder. There is no indica-

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submerged lands underlying navigable waters. We need not resolve this factual question, which was not addressed below. Suffice it to say that Congress's actions in 1891 were consistent with an understanding that the State did not have title to the riverbeds conveyed to Post, which, along with the later Harrison cession of part of the concededly navigable lake, is consistent with an understanding that no submerged lands within the reservation's stated boundaries had passed to Idaho.

[9] Here, we agree with the dissent, *post*, at 284, that Congress cannot, after statehood, reserve or convey submerged lands that "ha[ve] already been bestowed" upon a State. See *Shively* v. *Bowlby*, 152 U. S. 1, 26–28 (1894) (citing *Lessee of Pollard* v. *Hagan*, 3 How. 212 (1845)). Our point in mentioning Congress's actions after statehood is merely to confirm what Congress's prestatehood actions already make clear: that the lands at issue here were not bestowed upon Idaho at statehood, because Congress intended that they remain tribal reservation lands barring agreement to the contrary.

tion that Congress ever modified its objective of negotiated consensual transfer, which would have been defeated if Congress had let parts of the reservation pass to the State before the agreements with the Tribe were final. Any imputation to Congress either of bad faith or of secrecy in dropping its express objective of consensual dealing with the Tribe is at odds with the evidence. We therefore think the negotiating history, not to mention subsequent events, "ma[k]e [it] very plain," *Holt State Bank*, 270 U. S., at 55, that Congress recognized the full extent of the Executive Order reservation lying within the stated boundaries it ultimately confirmed, and intended to bar passage to Idaho of title to the submerged lands at issue here.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA, JUSTICE KENNEDY, and JUSTICE THOMAS join, dissenting.

The Court makes out a plausible case for the proposition that, on the day Idaho was admitted to the Union, the Executive Branch of the Federal Government had intended to retain in trust for the Coeur d'Alene Indian Tribe the submerged lands under a portion of Lake Coeur d'Alene. But the existence of such intent on the part of the Executive Branch is simply not enough to defeat an incoming State's title to submerged lands within its borders. Decisions of this Court going back more than 150 years establish this proposition beyond a shadow of a doubt.

"[T]he ownership of land under navigable waters," it bears repeating, "is an incident of sovereignty." *Montana* v. *United States*, 450 U. S. 544, 551 (1981). Recognizing this important relationship, this Court "announced the principle that the United States held the lands under navigable waters in the Territories 'in trust' for the future States that would

be created." *Utah Div. of State Lands* v. *United States*, 482 U. S. 193, 196 (1987) (quoting *Lessee of Pollard* v. *Hagan*, 3 How. 212, 230 (1845)). That duty may not lightly be disregarded, and, as the Court rightly observes, our inquiry "begin[s] with a strong presumption against defeat of a State's title." *Ante*, at 273 (internal quotation marks and citations omitted). Accordingly, "disposals [of submerged lands] by the United States during the territorial period . . . should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." *United States* v. *Holt State Bank*, 270 U. S. 49, 55 (1926); see also *Montana*, *supra*, at 552 ("[The Court] must not infer such a conveyance unless the intention was definitely declared or otherwise made very plain, or was rendered in clear and especial words, or unless the claim confirmed in terms embraces the land under the waters of the stream" (internal quotation marks and citations omitted)).

The Court makes three critical mistakes in its application of the equal footing doctrine here—errors that significantly dilute the doctrine. First and foremost, the Court misconceives the scope of historical events directly relevant to the question whether Congress *had*, by July 3, 1890, acted to withhold title to submerged lands from the entering State of Idaho. At the very moment that Idaho entered the Union "on an equal footing with the original States," Act of July 3, 1890, ch. 656, 26 Stat. 215, Congress and the President vested in Idaho the accoutrements of sovereignty, including title to submerged lands. It is therefore improper for the Court to look to events after Idaho's admission in order to discern whether Congress had months or years previously intended to divest the entering State of its submerged lands. Indeed, I am aware of no case applying the equal footing doctrine to determine title to submerged lands in which this Court has looked beyond the moment of statehood for evidence of federal intent.

Our decision in *United States* v. *Alaska*, 521 U. S. 1 (1997), is particularly illustrative of the timeframe relevant to our inquiry. That case concerned in part Alaska's assumption of title to submerged lands within the National Petroleum Reserve-Alaska (Reserve) and the Arctic National Wildlife Refuge (Refuge). See *id.*, at 4. In stark contrast to today's decision, the Court in its lengthy discussion in *Alaska* resisted entirely the temptation to delve into the treatment of the lands in question in the months and years following Alaska's admission to the Union in 1959. And the invitation to do so hardly could have been more obvious with respect to the Refuge, which had been "set apart" as a wildlife reservation but had not yet been formally approved by the Secretary of the Interior. *Id.*, at 46–47. "This application," the Court observed, "was still pending in July 1958, when Congress passed the Alaska Statehood Act, and in January 1959, when Alaska was formally admitted to the Union." *Id.*, at 46. Although the Court noted that the application was approved several months after Alaska's admission, the Court considered the pending application as relevant only insofar as it put Congress on notice of the action. See *id.*, at 56. The *Alaska* Court did not give—contrary to the Court's reasoning in the present case—any import to the fact that the application ultimately was approved. Indeed, *Alaska*'s focus on the instant of statehood as the crucial moment of inquiry could hardly be more clear. See, *e. g.*, *id.*, at 42 ("The conclusion that Congress was aware when it passed the Alaska Statehood Act that the Reserve encompassed submerged lands is reinforced by other legislation, *enacted just before Alaska's admission to the Union*, granting certain offshore lands to the Territory of Alaska"); *id.*, at 55 ("We now consider whether, *prior to Alaska's admission to the Union*, the United States defeated the future State's title to the submerged lands included within the proposed Range" (emphases added)). Other cases indicate

a similar emphasis. See, *e. g., Utah Div. of State Lands, supra,* at 195; *Montana,* 450 U. S., at 551.[1]

Accordingly, insofar as the submerged lands at issue here are concerned, it is of no moment that Congress ultimately ratified the 1887 and 1889 negotiations. See *ante,* at 279. Well before it took such action, Congress had given its assent to Idaho's entry into the Union as a sovereign State and thereby joined with the Executive to extinguish the Federal Government's right to withhold title to submerged lands. It follows that Congress' acceptance of the fact that "the Coeur d'Alene Reservation shall be held forever as Indian land," *ibid.,* does nothing to explain whether submerged lands were within that reservation at the time of—much less eight months after—Idaho's admission. By the same token, our inquiry is not illuminated by Congress' attempt in 1891 to affirm Chief Seltice's purported conveyance of certain lands to Frederick Post, see *ante,* at 271, 279, or by Congress' approval in 1894 of the so-called "Harrison cession," see *ante,* at 279–280. Simply put, the consequences of admission are instantaneous, and it ignores the uniquely sovereign character of that event for the Court to suggest that subsequent events somehow can diminish what has already been bestowed.

Second, all agree (at least in theory) that the question before us is "whether *Congress* intended to include land under navigable waters within the federal reservation and, if so, whether *Congress* intended to defeat the future State's title to the submerged lands," *ante,* at 273 (emphasis added). But the Court proceeds to determine this "intent" by considering what obviously are *not* Acts of Congress. Congress

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[1] The Court of Appeals stated that "we are aware of no rule forbidding consideration of such [post-statehood] events. Indeed, the case law may suggest the contrary. See *Alaska Pacific Fisheries* v. *United States,* 248 U. S. 78, 89–90 (1918)." 210 F. 3d 1067, 1079, n. 17 (CA9 2000). This citation is puzzling indeed, for Alaska was not admitted to the Union until some 40 years after the Court's decision in *Alaska Pacific Fisheries.*

itself did authorize negotiations with the Tribe in 1886 and 1889, but those Acts expressly provided that any resulting agreements were not binding "until ratified by Congress." Act of May 15, 1886, 24 Stat. 44, App. 51; Act of Mar. 2, 1889, 25 Stat. 1002, App. 144. And it is undisputed that ratification did not occur before Idaho gained admission. The Court, however, is willing to divine congressional intent to withhold submerged lands from the State from what are best described as inchoate prestatehood proceedings. In the Court's view it is sufficient that one House of Congress had acted to approve the agreements and that the other was in the process of considering similar legislation. See *ante*, at 278. The Court thus speaks of the "final" ratification of the 1887 and 1889 negotiations as if the official approval of both Houses of Congress was but a mere formality. *Ibid.* But see U. S. Const., Art. I, § 7, cl. 2. But the indisputable fact remains that, as of July 3, 1890, "Congress" had passed the Idaho Statehood Act but had not ratified the 1887 and 1889 agreements.

Nor do our prior decisions in this area support the Court's decision to wander so far afield. In *Alaska*, we evaluated the impact of an express provision in the Alaska Statehood Act, Pub. L. 85–508, 72 Stat. 347, reserving certain lands for the United States. 521 U. S., at 41–42. There the evidence that "Congress expressed a clear intent to defeat state title" to submerged lands came in the form of a duly passed federal statute rather than as inferences drawn from preludes to future congressional Acts. *Id.*, at 41. Indeed, that Statehood Act abounds in specificity, in § 11(b) directly identifying the Reserve, and in § 6(e) defining other reserved lands in some detail.[2] So, too, in *Utah Division of State*

[2] Again, the Court's reliance on language contained in the Idaho Statehood Act affirming the Idaho Constitution is unavailing. See *ante*, at 270. Clauses indicating that the entering State "forever disclaims all right and title to . . . all lands . . . owned or held by any Indians or Indian tribes" were boilerplate formulations at the time, and the inclusion of

Lands we evaluated prestatehood federal statutes without reference to inchoate proceedings lacking the force of law. 482 U. S., at 198–200 (discussing the impact on Utah's claim to certain submerged lands of the Sundry Appropriations Act of 1888, 25 Stat. 505, and the Sundry Appropriations Act of 1890, ch. 837, 26 Stat. 371). Cf. *Montana, supra,* at 550–555 (considering whether certain treaties vested property rights in the Crow Indians). We thus wisely have not relied on this sort of evidence in the past, and it is unfortunate that we embark upon that route today.

Third, despite the critical relationship between submerged lands and sovereignty, the Court makes the unwarranted assumption that any use granted with respect to navigable waters must necessarily include reserving title to the submerged lands below them. As the Court previously has explained, the purpose underlying a reservation of territorial lands is often probative of federal intent. See, *e. g., Alaska,* 521 U. S., at 39. Even accepting the District Court's conclusions regarding the Tribe's dietary habits, and further accepting this Court's inference that Congress was concerned with the Tribe's access to navigable waters,[3] it does

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this language hardly compares to the precision employed in the Alaska Statehood Act. Indeed, every State admitted between the years 1889 and 1912 entered with such a disclaimer. See N. D. Const., Art. 16, §2 (1889); S. D. Const., Art. XXII, §18 (1889); Mont. Const., Ordinance I (1889); Wash. Const., Art. XXVI, §2 (1889); Wyo. Const., Ordinance §3 (1889); Utah Const., Art. III (1894); Okla. Const., Art. I, §3 (1906); N. M. Const., Art. XXI, §2 (1910); Ariz. Const., Art. XX, par. 4 (1910). Tellingly, in each of these Constitutions save Oklahoma's, the relevant language is identical to that in the Idaho Constitution. This disclaimer, in any event, simply begs the question whether submerged lands were in fact "owned or held" by the Coeur d'Alene Tribe upon Idaho's admission.

[3] This inference may not be justified. Although Idaho apparently has conceded that the 1873 Executive Order included submerged lands within the reservation, that fact hardly confirms that Congress made a similar statement in simply authorizing negotiations with the Tribe. *United States* v. *Alaska,* 521 U. S. 1 (1997), moreover, indicates that it is at best

not necessarily follow that Congress intended to reserve title in submerged lands by authorizing negotiations leading to the cession of portions of the reservation established by the 1873 Executive Order.

It is perfectly consistent with the assumption that Congress wanted to preserve the Coeur d'Alene Indians' way of life to conclude that, if Congress meant to grant the Tribe any interest in Lake Coeur d'Alene, it was more likely a right to fish and travel the waters rather than withholding for the Tribe's benefit perpetual title in the underlying lands. See *Montana*, 450 U. S., at 554 ([Although the treaty] gave the Crow Indians the sole right to use and occupy the reserved land, and, implicitly, the power to exclude others from it, the respondents' reliance on that provision simply begs the question of the precise extent of the conveyed lands to which this exclusivity attaches"); see also *ibid.* ("The mere fact that the bed of a navigable water lies within the boundaries described in the treaty does not make the riverbed part of the conveyed land, especially when there is no express reference to the riverbed that might overcome the presumption against its conveyance").

For this reason, Congress' decision in 1888 to grant a right-of-way to the Washington and Idaho Railroad Company across a part of the Coeur d'Alene Reservation is not clear evidence of Congress' intent with respect to submerged lands. All but a miniscule portion of the right-of-way passes along surface lands, and it crosses the lake only at one of its narrowest points. There is no mention of submerged lands in the authorizing resolution, and it seems obvious that Congress required the company to pay

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an open question whether Executive action alone is sufficient to withhold title to submerged lands. *Id.*, at 43–45; cf. U. S. Const., Art. IV, § 3, cl. 2 ("The *Congress* shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States" (emphasis added)). Thus, the majority rests far too much weight on Idaho's concession regarding the 1873 reservation.

compensation to the Tribe because of the significant impact the railroad would have upon surface lands:

> "[T]he right of way hereby granted to said company shall be seventy-five feet in width on each side of the central line of said railroad as aforesaid[;] and said company shall also have the right to take from said lands adjacent to the line of said road material, stone, earth, and timber necessary for the construction of said railroad; also, ground adjacent to such right of way for station-buildings, depots, machine-shops, side-tracks, turnouts, and water-stations, not to exceed in amount three hundred feet in width and three thousand feet in length for each station, to the extent one station for each ten miles of road." App. 138.

Thus, I do not think it just to infer any intent regarding submerged lands from Congress' requirement of compensation for what was to be primarily an intrusion—and a significant one at that—upon surface lands.

In sum, the evidence of congressional intent properly before the Court today fails to rise to anywhere near the level of certainty our cases require. Congress' desire to divest an entering State of its sovereign interest in submerged lands must be "definitely declared or otherwise made very plain," *Montana, supra,* at 552. That standard has not been met here.

Syllabus

IMMIGRATION AND NATURALIZATION SERVICE *v.* ST. CYR

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 00–767. Argued April 24, 2001—Decided June 25, 2001

Before the effective dates of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), § 212(c) of the Immigration and Nationality Act of 1952 was interpreted to give the Attorney General broad discretion to waive deportation of resident aliens. As relevant here, the large class of aliens depending on § 212(c) relief was reduced in 1996 by § 401 of AEDPA, which identified a broad set of offenses for which convictions would preclude such relief; and by IIRIRA, which repealed § 212(c) and replaced it with a new section excluding from the class anyone "convicted of an aggravated felony," 8 U. S. C. § 1229b(a)(3). Respondent St. Cyr, a lawful permanent United States resident, pleaded guilty to a criminal charge that made him deportable. He would have been eligible for a waiver of deportation under the immigration law in effect when he was convicted, but his removal proceedings were commenced after AEDPA's and IIRIRA's effective dates. The Attorney General claims that those Acts withdrew his authority to grant St. Cyr a waiver. The Federal District Court accepted St. Cyr's habeas corpus application and agreed that the new restrictions do not apply to removal proceedings brought against an alien who pleaded guilty to a deportable crime before their enactment. The Second Circuit affirmed.

Held:

1. Courts have jurisdiction under 28 U. S. C. § 2241 to decide the legal issue raised by St. Cyr's habeas petition. Pp. 298–314.

(a) To prevail on its claim that AEDPA and IIRIRA stripped federal courts of jurisdiction to decide a pure question of law, as in this case, petitioner Immigration and Naturalization Service (INS) must overcome both the strong presumption in favor of judicial review of administrative action and the longstanding rule requiring a clear and unambiguous statement of congressional intent to repeal habeas jurisdiction. Here, that plain statement rule draws additional reinforcement from other canons of statutory construction: First, when a statutory interpretation invokes the outer limits of Congress' power, there must be a clear indication that Congress intended that result; and

second, if an otherwise acceptable construction would raise serious constitutional problems and an alternative interpretation is fairly possible, the statute must be construed to avoid such problems. Pp. 298–300.

(b) Construing the amendments at issue to preclude court review of a pure question of law would give rise to substantial constitutional questions. The Constitution's Suspension Clause, which protects the privilege of the habeas corpus writ, unquestionably requires some judicial intervention in deportation cases. *Heikkila* v. *Barber*, 345 U. S. 229, 235. Even assuming that the Clause protects only the writ as it existed in 1789, substantial evidence supports St. Cyr's claim that pure questions of law could have been answered in 1789 by a common-law judge with power to issue the writ. Thus, a serious Suspension Clause issue would arise if the 1996 statutes have withdrawn that power from federal judges and provided no adequate substitute. The need to resolve such a serious and difficult constitutional question and the desirability of avoiding that necessity reinforce the reasons for requiring a clear and unambiguous statement of congressional intent. Pp. 300–305.

(c) To conclude that the writ is no longer available in this context would also represent a marked departure from historical immigration law practice. The writ has always been available to review the legality of Executive detention, see, *e. g.*, *Felker* v. *Turpin*, 518 U. S. 651, 663, and, until the 1952 Act, a habeas action was the sole means of challenging a deportation order's legality, see, *e. g.*, *Heikkila*, 345 U. S., at 235. Habeas courts have answered questions of law in alien suits challenging Executive interpretations of immigration law and questions of law that arose in the discretionary relief context. Pp. 305–308.

(d) Neither AEDPA § 401(e) nor three IIRIRA provisions, 8 U. S. C. §§ 1252(a)(1), (a)(2)(C), and (b)(9), express a clear and unambiguous statement of Congress' intent to bar 28 U. S. C. § 2241 petitions. None of these sections even mentions § 2241. Section 401(e)'s repeal of a subsection of the 1961 Act, which provided, *inter alia*, habeas relief for an alien in custody pursuant to a deportation order, is not sufficient to eliminate what the repealed section did not grant—namely, habeas jurisdiction pursuant to § 2241. See *Ex parte Yerger*, 8 Wall. 85, 105–106. The three IIRIRA provisions do not speak with sufficient clarity to bar habeas jurisdiction. They focus on "judicial review" or "jurisdiction to review." In the immigration context, however, "judicial review" and "habeas corpus" have historically distinct meanings, with habeas courts playing a far narrower role. Pp. 308–314.

2. Section 212(c) relief remains available for aliens, like St. Cyr, whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect. Pp. 314–326.

Syllabus

(a) A statute's language must require that it be applied retroactively. *Bowen* v. *Georgetown Univ. Hospital*, 488 U. S. 204, 208. The first step in the impermissible-retroactive-effect determination is to ascertain whether Congress has directed with the requisite clarity that the law be applied retrospectively. *Martin* v. *Hadix*, 527 U. S. 343, 352. Such clarity is not shown by the comprehensiveness of IIRIRA's revision of federal immigration law, see *Landgraf* v. *USI Film Products*, 511 U. S. 244, 260–261, by the promulgation of IIRIRA's effective date, see *id.*, at 257, or by IIRIRA § 309(c)(1)'s "saving provision." Pp. 314–320.

(b) The second step is to determine whether IIRIRA attaches new legal consequences to events completed before its enactment, a judgment informed and guided by considerations of fair notice, reasonable reliance, and settled expectations. *Landgraf*, 511 U. S., at 270. IIRIRA's elimination of § 212(c) relief for people who entered into plea agreements expecting that they would be eligible for such relief clearly attaches a new disability to past transactions or considerations. Plea agreements involve a *quid pro quo* between a criminal defendant and the government, and there is little doubt that alien defendants considering whether to enter into such agreements are acutely aware of their convictions' immigration consequences. The potential for unfairness to people like St. Cyr is significant and manifest. Now that prosecutors have received the benefit of plea agreements, facilitated by the aliens' belief in their continued eligibility for § 212(c) relief, it would be contrary to considerations of fair notice, reasonable reliance, and settled expectations to hold that IIRIRA deprives them of any possibility of such relief. The INS' argument that application of deportation law can never have retroactive effect because deportation proceedings are inherently prospective is not particularly helpful in undertaking *Landgraf*'s analysis, and the fact that deportation is not punishment for past crimes does not mean that the Court cannot consider an alien's reasonable reliance on the continued availability of discretionary relief from deportation when deciding the retroactive effect of eliminating such relief. That § 212(c) relief is discretionary does not affect the propriety of this Court's conclusion, for there is a clear difference between facing possible deportation and facing certain deportation. Pp. 320–326.

229 F. 3d 406, affirmed.

STEVENS, J., delivered the opinion of the Court, in which KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. O'CONNOR, J., filed a dissenting opinion, *post*, p. 326. SCALIA, J., filed a dissenting opinion, in

which REHNQUIST, C. J., and THOMAS, J., joined, and in which O'CONNOR, J., joined as to Parts I and III, *post*, p. 326.

Deputy Solicitor General Kneedler argued the cause for petitioner. With him on the briefs were *Acting Solicitor General Underwood, Acting Assistant Attorney General Schiffer, Paul R. Q. Wolfson, Stephen C. Robinson, Donald E. Keener, Alison R. Drucker, Ernesto H. Molina,* and *James K. Filan, Jr.*

Lucas Guttentag argued the cause for respondent. With him on the brief were *Lee Gelernt, Judy Rabinovitz, Steven R. Shapiro, Jayashri Srikantiah, Michael G. Moore,* and *Paul A. Engelmayer.**

JUSTICE STEVENS delivered the opinion of the Court.

Both the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), enacted on April 24, 1996, 110 Stat. 1214, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), enacted on September 30, 1996, 110 Stat. 3009–546, contain comprehensive amendments to the Immigration and Nationality Act (INA), 66 Stat. 163, as amended, 8 U. S. C. § 1101 *et seq.* This case raises two important questions about the impact of those amendments. The first question is a procedural one, concerning the effect of those amendments on the availability of habeas corpus jurisdiction under 28 U. S. C. § 2241. The second question is a substantive one, concerning the impact of the amendments on conduct that occurred before

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**Daniel J. Popeo* and *R. Shawn Gunnarson* filed a brief for the Washington Legal Foundation as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the Florida Immigrant Advocacy Center et al. by *Rebecca Sharpless;* and for the National Association of Criminal Defense Lawyers et al. by *Manuel D. Vargas* and *Joshua L. Dratel.*

James Oldham, Michael J. Wishnie, and *Douglas W. Baruch* filed a brief for Legal Historians as *amici curiae.*

their enactment and on the availability of discretionary relief from deportation.

Respondent, Enrico St. Cyr, is a citizen of Haiti who was admitted to the United States as a lawful permanent resident in 1986. Ten years later, on March 8, 1996, he pleaded guilty in a state court to a charge of selling a controlled substance in violation of Connecticut law. That conviction made him deportable. Under pre-AEDPA law applicable at the time of his conviction, St. Cyr would have been eligible for a waiver of deportation at the discretion of the Attorney General. However, removal proceedings against him were not commenced until April 10, 1997, after both AEDPA and IIRIRA became effective, and, as the Attorney General interprets those statutes, he no longer has discretion to grant such a waiver.

In his habeas corpus petition, respondent has alleged that the restrictions on discretionary relief from deportation contained in the 1996 statutes do not apply to removal proceedings brought against an alien who pleaded guilty to a deportable crime before their enactment. The District Court accepted jurisdiction of his application and agreed with his submission. In accord with the decisions of four other Circuits, the Court of Appeals for the Second Circuit affirmed.[1] 229 F. 3d 406 (2000). The importance of both questions warranted our grant of certiorari. 531 U. S. 1107 (2001).

I

The character of the pre-AEDPA and pre-IIRIRA law that gave the Attorney General discretion to waive deportation in certain cases is relevant to our appraisal of both the substantive and the procedural questions raised by

[1] See *Mahadeo* v. *Reno*, 226 F. 3d 3 (CA1 2000); *Liang* v. *INS*, 206 F. 3d 308 (CA3 2000); *Tasios* v. *Reno*, 204 F. 3d 544 (CA4 2000); *Flores-Miramontes* v. *INS*, 212 F. 3d 1133 (CA9 2000). But see *Max-George* v. *Reno*, 205 F. 3d 194 (CA5 2000); *Morales-Ramirez* v. *Reno*, 209 F. 3d 977 (CA7 2000); *Richardson* v. *Reno*, 180 F. 3d 1311 (CA11 1999).

the petition of the Immigration and Naturalization Service (INS). We shall therefore preface our discussion of those questions with an overview of the sources, history, and scope of that law.

Subject to certain exceptions, § 3 of the Immigration Act of 1917 excluded from admission to the United States several classes of aliens, including, for example, those who had committed crimes "involving moral turpitude." 39 Stat. 875. The seventh exception provided "[t]hat aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Secretary of Labor, and under such conditions as he may prescribe." *Id.*, at 878.[2] Although that provision applied literally only to exclusion proceedings, and although the deportation provisions of the statute did not contain a similar provision, the INS relied on § 3 to grant relief in deportation proceedings involving aliens who had departed and returned to this country after the ground for deportation arose. See, *e. g.*, *Matter of L*, 1 I. & N. Dec. 1, 2 (1940).[3]

Section 212 of the Immigration and Nationality Act of 1952, which replaced and roughly paralleled § 3 of the 1917 Act, excluded from the United States several classes of aliens, including those convicted of offenses involving moral turpitude or the illicit traffic in narcotics. See 66 Stat. 182–187. As with the prior law, this section was subject to a proviso granting the Attorney General broad discretion to

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[2] The INS was subsequently transferred to the Department of Justice. See *Matter of L*, 1 I. & N. Dec. 1, n. 1 (1940). As a result, the powers previously delegated to the Secretary of Labor were transferred to the Attorney General. See *id.*, at 2.

[3] The exercise of discretion was deemed a *nunc pro tunc* correction of the record of reentry. In approving of this construction, the Attorney General concluded that strictly limiting the seventh exception to exclusion proceedings would be "capricious and whimsical." *Id.*, at 5.

admit excludable aliens. See *id.*, at 187. That proviso, codified at 8 U. S. C. § 1182(c), stated:

> "Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General . . . ."

Like § 3 of the 1917 Act, § 212(c) was literally applicable only to exclusion proceedings, but it too has been interpreted by the Board of Immigration Appeals (BIA) to authorize any permanent resident alien with "a lawful unrelinquished domicile of seven consecutive years" to apply for a discretionary waiver from deportation. See *Matter of Silva*, 16 I. & N. Dec. 26, 30 (1976) (adopting position of *Francis* v. *INS*, 532 F. 2d 268 (CA2 1976)). If relief is granted, the deportation proceeding is terminated and the alien remains a permanent resident.

The extension of § 212(c) relief to the deportation context has had great practical importance, because deportable offenses have historically been defined broadly. For example, under the INA, aliens are deportable upon conviction for two crimes of "moral turpitude" (or for one such crime if it occurred within five years of entry into the country and resulted in a jail term of at least one year). See 8 U. S. C. §§ 1227(a)(2)(A)(i)–(ii) (1994 ed., Supp. V). In 1988, Congress further specified that an alien is deportable upon conviction for any "aggravated felony," Anti-Drug Abuse Act of 1988, 102 Stat. 4469–4470, § 1227(a)(2)(A)(iii), which was defined to include numerous offenses without regard to how long ago they were committed.[4] Thus, the class of aliens

[4] See 8 U. S. C. § 1101(a)(43) (1994 ed. and Supp. V). While the term has always been defined expansively, it was broadened substantially by IIRIRA. For example, as amended by that statute, the term includes all convictions for theft or burglary for which a term of imprisonment

whose continued residence in this country has depended on their eligibility for § 212(c) relief is extremely large, and not surprisingly, a substantial percentage of their applications for § 212(c) relief have been granted.[5] Consequently, in the period between 1989 and 1995 alone, § 212(c) relief was granted to over 10,000 aliens.[6]

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of at least one year is imposed (as opposed to five years pre-IIRIRA), compare § 1101(a)(43)(G) (1994 ed., Supp. V) with § 1101(a)(43)(G) (1994 ed.), and all convictions involving fraud or deceit in which the loss to the victim exceeds $10,000 (as opposed to $200,000 pre-IIRIRA), compare § 1101(a)(43)(M)(i) (1994 ed., Supp. V) with § 1101(a)(43)(M)(i) (1994 ed.). In addition, the term includes any "crime of violence" resulting in a prison sentence of at least one year (as opposed to five years pre-IIRIRA), compare § 1101(a)(43)(F) (1994 ed., Supp. V) with § 1101(a)(43)(F) (1994 ed.), and that phrase is itself broadly defined. See 18 U. S. C. § 16 ("[A]n offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another," or "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense").

[5] See, *e. g.*, Rannik, The Anti-Terrorism and Effective Death Penalty Act of 1996: A Death Sentence for the 212(c) Waiver, 28 U. Miami Inter-Am. L. Rev. 123, 150, n. 80 (1996) (providing statistics indicating that 51.5% of the applications for which a final decision was reached between 1989 and 1995 were granted); see also *Mattis* v. *Reno*, 212 F. 3d 31, 33 (CA1 2000) ("[I]n the years immediately preceding the statute's passage, over half the applications were granted"); *Tasios*, 204 F. 3d, at 551 (same).

In developing these changes, the BIA developed criteria, comparable to common-law rules, for deciding when deportation is appropriate. Those criteria, which have been set forth in several BIA opinions, see, *e. g.*, *Matter of Marin*, 16 I. & N. Dec. 581 (1978), include the seriousness of the offense, evidence of either rehabilitation or recidivism, the duration of the alien's residence, the impact of deportation on the family, the number of citizens in the family, and the character of any service in the Armed Forces.

[6] See Rannik, 28 U. Miami Inter-Am. L. Rev., at 150, n. 80. However, based on these statistics, one cannot form a reliable estimate of the number of individuals who will be affected by today's decision. Since the 1996 statutes expanded the definition of "aggravated felony" substantially—and retroactively—the number of individuals now subject to deportation absent § 212(c) relief is significantly higher than these figures would sug-

Three statutes enacted in recent years have reduced the size of the class of aliens eligible for such discretionary relief. In 1990, Congress amended § 212(c) to preclude from discretionary relief anyone convicted of an aggravated felony who had served a term of imprisonment of at least five years. § 511, 104 Stat. 5052 (amending 8 U. S. C. § 1182(c)). In 1996, in § 440(d) of AEDPA, Congress identified a broad set of offenses for which convictions would preclude such relief. See 110 Stat. 1277 (amending 8 U. S. C. § 1182(c)).[7] And finally, that same year, Congress passed IIRIRA. That statute, *inter alia*, repealed § 212(c), see § 304(b), 110 Stat. 3009–597, and replaced it with a new section that gives the Attorney General the authority to cancel removal for a narrow class of inadmissible or deportable aliens, see *id.*, at 3009–594 (creating 8 U. S. C. § 1229b (1994 ed., Supp. V)). So narrowed, that class does not include anyone previously "convicted of any aggravated felony." § 1229b(a)(3) (1994 ed., Supp. V).

In the Attorney General's opinion, these amendments have entirely withdrawn his § 212(c) authority to waive deportation for aliens previously convicted of aggravated felonies. Moreover, as a result of other amendments adopted in AEDPA and IIRIRA, the Attorney General also maintains that there is no judicial forum available to decide whether these statutes did, in fact, deprive him of the power to grant such relief. As we shall explain below, we disagree on both points. In our view, a federal court does have jurisdiction to decide the merits of the legal question, and

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gest. In addition, the nature of the changes (bringing under the definition more minor crimes which may have been committed many years ago) suggests that an increased percentage of applicants will meet the stated criteria for § 212(c) relief.

[7] The new provision barred review for individuals ordered deported because of a conviction for an aggravated felony, for a drug conviction, for certain weapons or national security violations, and for multiple convictions involving crimes of moral turpitude. See 110 Stat. 1277.

the District Court and the Court of Appeals decided that question correctly in this case.

II

The first question we must consider is whether the District Court retains jurisdiction under the general habeas corpus statute, 28 U. S. C. § 2241, to entertain St. Cyr's challenge. His application for a writ raises a pure question of law. He does not dispute any of the facts that establish his deportability or the conclusion that he is deportable. Nor does he contend that he would have any right to have an unfavorable exercise of the Attorney General's discretion reviewed in a judicial forum. Rather, he contests the Attorney General's conclusion that, as a matter of statutory interpretation, he is not eligible for discretionary relief.

The District Court held, and the Court of Appeals agreed, that it had jurisdiction to answer that question in a habeas corpus proceeding.[8] The INS argues, however, that four sections of the 1996 statutes—specifically, § 401(e) of AEDPA and three sections of IIRIRA (8 U. S. C. §§ 1252(a)(1), 1252(a)(2)(C), and 1252(b)(9) (1994 ed., Supp. V))—stripped the courts of jurisdiction to decide the question of law presented by respondent's habeas corpus application.

For the INS to prevail it must overcome both the strong presumption in favor of judicial review of administrative action[9] and the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction. See *Ex parte Yerger*, 8 Wall. 85, 102 (1869) ("We are not at liberty to except from [habeas corpus jurisdiction] any cases not plainly excepted by law"); *Felker* v. *Turpin*, 518 U. S. 651, 660–661 (1996) (noting that "[n]o provision of Title I

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[8] See n. 1, *supra;* n. 33, *infra.*

[9] See, *e. g., Bowen* v. *Michigan Academy of Family Physicians*, 476 U. S. 667, 670 (1986); see also *McNary* v. *Haitian Refugee Center, Inc.*, 498 U. S. 479, 498 (1991); *Webster* v. *Doe*, 486 U. S. 592, 603 (1988); *Johnson* v. *Robison*, 415 U. S. 361, 373–374 (1974).

mentions our authority to entertain original habeas petitions," and the statute "makes no mention of our authority to hear habeas petitions filed as original matters in this Court").[10] Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal. *Ex parte Yerger*, 8 Wall., at 105 ("Repeals by implication are not favored. They are seldom admitted except on the ground of repugnancy; and never, we think, when the former act can stand together with the new act").[11]

In this case, the plain statement rule draws additional reinforcement from other canons of statutory construction. First, as a general matter, when a particular interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. See *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988). Second, if an otherwise acceptable construction of a statute

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[10] "In traditionally sensitive areas, . . . the requirement of [a] clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Gregory* v. *Ashcroft*, 501 U. S. 452, 461 (1991) (internal quotation marks and citations omitted); see *United States* v. *Nordic Village, Inc.*, 503 U. S. 30, 33 (1992) ("Waivers of the [Federal] Government's sovereign immunity, to be effective, must be 'unequivocally expressed' "); *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 242 (1985) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute"); see also Eskridge & Frickey, Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking, 45 Vand. L. Rev. 593, 597 (1992) ("[T]he Court . . . has tended to create the strongest clear statement rules to confine Congress's power in areas in which Congress has the constitutional power to do virtually anything").

[11] Cf. *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1018 (1984) ("[W]here two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective" (internal quotation marks omitted)).

would raise serious constitutional problems, and where an alternative interpretation of the statute is "fairly possible," see *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932), we are obligated to construe the statute to avoid such problems. See *Ashwander* v. *TVA*, 297 U. S. 288, 341, 345–348 (1936) (Brandeis, J., concurring); *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408 (1909).[12]

A construction of the amendments at issue that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions. Article I, § 9, cl. 2, of the Constitution provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Because of that Clause, some "judicial intervention in deportation cases" is unquestionably "required by the Constitution." *Heikkila* v. *Barber*, 345 U. S. 229, 235 (1953).

Unlike the provisions of AEDPA that we construed in *Felker* v. *Turpin*, 518 U. S. 651 (1996), this case involves an alien subject to a federal removal order rather than a person confined pursuant to a state-court conviction. Accordingly, regardless of whether the protection of the Suspension

[12] "As was stated in *Hooper* v. *California*, 155 U. S. 648, 657 (1895), '[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.' This approach . . . also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988) (citing *Grenada County Supervisors* v. *Brogden*, 112 U. S. 261, 269 (1884)); see also *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490, 499–501, 504 (1979); *Murray* v. *Schooner Charming Betsy*, 2 Cranch 64, 118 (1804); *Machinists* v. *Street*, 367 U. S. 740, 749–750 (1961); *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932); *Lucas* v. *Alexander*, 279 U. S. 573, 577 (1929); *Panama R. Co.* v. *Johnson*, 264 U. S. 375, 390 (1924); *Delaware & Hudson Co.*, 213 U. S., at 407–408; *Parsons* v. *Bedford*, 3 Pet. 433, 448–449 (1830) (Story, J.).

Clause encompasses all cases covered by the 1867 Amendment extending the protection of the writ to state prisoners, cf. *id.*, at 663–664, or by subsequent legal developments, see *LaGuerre* v. *Reno*, 164 F. 3d 1035 (CA7 1998), at the absolute minimum, the Suspension Clause protects the writ "as it existed in 1789."[13] *Felker*, 518 U. S., at 663–664.

At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest.[14] See, *e. g.*, *Swain* v. *Pressley*, 430 U. S. 372, 380, n. 13 (1977); *id.*, at 385–386 (Burger, C. J., concurring) (noting that "the traditional Great Writ was largely a remedy against executive detention"); *Brown* v. *Allen*, 344 U. S. 443, 533 (1953) (Jackson, J., concurring in result) ("The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial"). In England prior to 1789, in the Colonies,[15] and in this Nation during the formative years of our Government, the writ of habeas corpus was available to nonenemy aliens as well as to citi-

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[13] The fact that this Court would be required to answer the difficult question of what the Suspension Clause protects is in and of itself a reason to avoid answering the constitutional questions that would be raised by concluding that review was barred entirely. Cf. Neuman, Habeas Corpus, Executive Detention, and the Removal of Aliens, 98 Colum. L. Rev. 961, 980 (1998) (noting that "reconstructing habeas corpus law . . . [for purposes of a Suspension Clause analysis] would be a difficult enterprise, given fragmentary documentation, state-by-state disuniformity, and uncertainty about how state practices should be transferred to new national institutions").

[14] At common law, "[w]hile habeas review of a court judgment was limited to the issue of the sentencing court's jurisdictional competency, an attack on an executive order could raise all issues relating to the legality of the detention." Note, Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1238 (1970).

[15] See W. Duker, A Constitutional History of Habeas Corpus 115 (1980) (noting that "the common-law writ of habeas corpus was in operation in all thirteen of the British colonies that rebelled in 1776").

zens.[16] It enabled them to challenge Executive and private detention in civil cases as well as criminal.[17] Moreover, the issuance of the writ was not limited to challenges to the jurisdiction of the custodian, but encompassed detentions based on errors of law, including the erroneous application or interpretation of statutes.[18] It was used to command the discharge of seamen who had a statutory exemption from impressment into the British Navy,[19] to emancipate slaves,[20] and to obtain the freedom of apprentices[21] and asylum inmates.[22] Most important, for our purposes, those early cases contain no suggestion that habeas relief in cases in-

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[16] See *Sommersett* v. *Stewart*, 20 How. St. Tr. 1, 79–82 (K. B. 1772); *Case of the Hottentot Venus*, 13 East 195, 104 Eng. Rep. 344 (K. B. 1810); *King* v. *Schiever*, 2 Burr. 765, 97 Eng. Rep. 551 (K. B. 1759); *United States* v. *Villato*, 28 F. Cas. 377 (No. 16,622) (CC Pa. 1797); *Commonwealth* v. *Holloway*, 1 Serg. & Rawle 392 (Pa. 1815); *Ex parte D'Olivera*, 7 F. Cas. 853 (No. 3,967) (CC Mass. 1813); see also Brief for Legal Historians as *Amici Curiae* 10–11; Neuman, Habeas Corpus, Executive Detention, and the Removal of Aliens, 98 Colum. L. Rev., at 990–1004.

[17] See *King* v. *Nathan*, 2 Strange 880, 93 Eng. Rep. 914 (K. B. 1724); *Ex parte Boggin*, 13 East 549, 104 Eng. Rep. 484 (K. B. 1811); *Hollingshead's Case*, 1 Salkeld 351, 91 Eng. Rep. 307 (K. B. 1702); *Dr. Groenvelt's Case*, 1 Ld. Raym. 213, 91 Eng. Rep. 1038 (K. B. 1702); *Bushell's Case*, Vaughan 135, 124 Eng. Rep. 1006 (C. P. 1670); *Ex parte Randolph*, 20 F. Cas. 242 (No. 11,558) (CC Va. 1833) (Marshall, C. J., on circuit); *Ex parte D'Olivera*, 7 F. Cas. 853 (No. 3,967) (CC Mass. 1813); *Respublica* v. *Keppele*, 2 Dall. 197 (Pa. 1793).

[18] See, *e. g.*, *Hollingshead's Case*, 1 Salkeld 351, 91 Eng. Rep. 307 (K. B. 1702); *King* v. *Nathan*, 2 Strange 880, 93 Eng. Rep. 914 (K. B. 1724); *United States* v. *Bainbridge*, 24 F. Cas. 946 (No. 14,497) (CC Mass. 1816); *Ex parte Randolph*, 20 F. Cas. 242 (No. 11,558) (CC Va. 1833) (Marshall, C. J., on circuit); see also Brief for Legal Historians as *Amici Curiae* 3–10 (collecting cases).

[19] See, *e. g.*, the case of *King* v. *White* (1746) quoted in the addendum to *Sommersett* v. *Stewart*, 20 How. St. Tr., at 1376.

[20] *Id.*, at 79–82.

[21] *King* v. *Delaval*, 3 Burr. 1434, 97 Eng. Rep. 913 (K. B. 1763).

[22] *King* v. *Turlington*, 2 Burr. 1115, 97 Eng. Rep. 741 (K. B. 1761).

volving Executive detention was only available for constitutional error.[23]

Notwithstanding the historical use of habeas corpus to remedy unlawful Executive action, the INS argues that this case falls outside the traditional scope of the writ at common law. It acknowledges that the writ protected an individual who was held without legal authority, but argues that the writ would not issue where "an official had statutory authorization to detain the individual . . . but . . . the official was not properly exercising his discretionary power to determine whether the individual should be released." Brief for Respondent in *Colcano-Martinez* v. *INS*, O. T. 2000, No. 00–1011, p. 33. In this case, the INS points out, there is no dispute that the INS had authority in law to hold St. Cyr, as he is eligible for removal. St. Cyr counters that there is historical evidence of the writ issuing to redress the

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[23] See, *e. g.*, *Ex parte Boggin*, 13 East 549, n. (b), 104 Eng. Rep. 484, n. (a)[2] (K. B. 1811) (referring to *Chalacombe's Case*, in which the court required a response from the Admiralty in a case involving the impressment of a master of a coal vessel, despite the argument that exemptions for "seafaring persons of this description" were given only as a matter of "grace and favour," not "of right"); *Hollingshead's Case*, 1 Salkeld 351, 91 Eng. Rep. 307 (K. B. 1702) (granting relief on the grounds that the language of the warrant of commitment—authorizing detention until *"otherwise discharged by due course of law"*—exceeded the authority granted under the statute to commit "till [the bankrupt] submit himself to be examined by the commissioners"); see also Brief for Legal Historians as *Amici Curiae* 8–10, 18–28.

The dissent, however, relies on *Chalacombe's Case* as its sole support for the proposition that courts treated Executive discretion as "lying entirely beyond the judicial ken." See *post*, at 343 (opinion of SCALIA, J.). Although Lord Ellenborough expressed "some hesitation" as to whether the case should "stand over for the consideration of the Admiralty," he concluded that, given the public importance of the question, the response should be called for. 13 East, at 549, n. (b), 104 Eng. Rep., at 484, n. (a)[2]. The case ultimately became moot when the Admiralty discharged Chalacombe, but it is significant that, despite some initial hesitation, the court decided to proceed.

improper exercise of official discretion. See n. 23, *supra;* Hafetz, The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts, 107 Yale L. J. 2509 (1998).

St. Cyr's constitutional position also finds some support in our prior immigration cases. In *Heikkila* v. *Barber*, the Court observed that the then-existing statutory immigration scheme "had the effect of precluding judicial intervention in deportation cases *except insofar as it was required by the Constitution*," 345 U. S., at 234–235 (emphasis added)—and that scheme, as discussed below, did allow for review on habeas of questions of law concerning an alien's eligibility for discretionary relief. Therefore, while the INS' historical arguments are not insubstantial, the ambiguities in the scope of the exercise of the writ at common law identified by St. Cyr, and the suggestions in this Court's prior decisions as to the extent to which habeas review could be limited consistent with the Constitution, convince us that the Suspension Clause questions that would be presented by the INS' reading of the immigration statutes before us are difficult and significant.[24]

In sum, even assuming that the Suspension Clause protects only the writ as it existed in 1789, there is substantial

[24] The dissent reads into Chief Justice Marshall's opinion in *Ex parte Bollman*, 4 Cranch 75 (1807), support for a proposition that the Chief Justice did not endorse, either explicitly or implicitly. See *post*, at 339–340 (opinion of SCALIA, J.). He did note that "the first congress of the United States" acted under "the immediate influence" of the injunction provided by the Suspension Clause when it gave "life and activity" to "this great constitutional privilege" in the Judiciary Act of 1789, and that the writ could not be suspended until after the statute was enacted. 4 Cranch, at 95. That statement, however, surely does not imply that Marshall believed the Framers had drafted a Clause that would proscribe a temporary abrogation of the writ, while permitting its permanent suspension. Indeed, Marshall's comment expresses the far more sensible view that the Clause was intended to preclude any possibility that "the privilege itself would be lost" by either the inaction or the action of Congress. See, *e. g., ibid.* (noting that the Founders "must have felt, with peculiar force, the obligation" imposed by the Suspension Clause).

evidence to support the proposition that pure questions of law like the one raised by the respondent in this case could have been answered in 1789 by a common-law judge with power to issue the writ of habeas corpus. It necessarily follows that a serious Suspension Clause issue would be presented if we were to accept the INS' submission that the 1996 statutes have withdrawn that power from federal judges and provided no adequate substitute for its exercise. See Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1395–1397 (1953). The necessity of resolving such a serious and difficult constitutional issue—and the desirability of avoiding that necessity—simply reinforce the reasons for requiring a clear and unambiguous statement of congressional intent.

Moreover, to conclude that the writ is no longer available in this context would represent a departure from historical practice in immigration law. The writ of habeas corpus has always been available to review the legality of Executive detention. See *Felker*, 518 U. S., at 663; *Swain* v. *Pressley*, 430 U. S., at 380, n. 13; *id.*, at 385–386 (Burger, C. J., concurring); *Brown* v. *Allen*, 344 U. S., at 533 (Jackson, J., concurring in result). Federal courts have been authorized to issue writs of habeas corpus since the enactment of the Judiciary Act of 1789, and § 2241 of the Judicial Code provides that federal judges may grant the writ of habeas corpus on the application of a prisoner held "in custody in violation of the Constitution or laws or treaties of the United States."[25] 28 U. S. C. § 2241. Before and after the enactment in 1875 of the first statute regulating immigration, 18 Stat. 477, that jurisdiction was regularly invoked on behalf of noncitizens, particularly in the immigration context. See, *e. g.*, *In re*

[25] In fact, § 2241 descends directly from § 14 of the Judiciary Act of 1789 and the 1867 Act. See Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82; Act of Feb. 5, 1867, ch. 28, 14 Stat. 385. Its text remained undisturbed by either AEDPA or IIRIRA.

Kaine, 14 How. 103 (1853); *United States* v. *Jung Ah Lung*, 124 U. S. 621, 626–632 (1888).

Until the enactment of the 1952 Immigration and Nationality Act, the sole means by which an alien could test the legality of his or her deportation order was by bringing a habeas corpus action in district court.[26] See, *e. g.*, *United States* v. *Jung Ah Lung*, 124 U. S. 621 (1888); *Heikkila*, 345 U. S., at 235; *Chin Yow* v. *United States*, 208 U. S. 8 (1908); *Ng Fung Ho* v. *White*, 259 U. S. 276, 284 (1922). In such cases, other than the question whether there was some evidence to support the order,[27] the courts generally did not review factual determinations made by the Executive. See *Ekiu* v. *United States*, 142 U. S. 651, 659 (1892). However, they did review the Executive's legal determinations. See *Gegiow* v. *Uhl*, 239 U. S. 3, 9 (1915) ("The statute by enumerating the conditions upon which the allowance to land may be denied, prohibits the denial in other cases. And when the record shows that a commissioner of immigration is exceeding his power, the alien may demand his release upon *habeas corpus*"); see also Neuman, Jurisdiction and the Rule of Law after the 1996 Immigration Act, 113 Harv. L. Rev. 1963, 1965–1969 (2000).[28] In case after case, courts answered questions of law in ha-

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[26] After 1952, judicial review of deportation orders could also be obtained by declaratory judgment actions brought in federal district court. *Shaughnessy* v. *Pedreiro*, 349 U. S. 48 (1955). However, in 1961, Congress acted to consolidate review in the courts of appeals. See *Foti* v. *INS*, 375 U. S. 217 (1963).

[27] See, *e. g.*, *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 106 (1927) (holding that deportation "on charges unsupported by any evidence is a denial of due process which may be corrected on *habeas corpus*").

[28] "And when the record shows that a commissioner of immigration is exceeding his power, the alien may demand his release upon *habeas corpus*. The conclusiveness of the decisions of immigration officers under § 25 is conclusiveness upon matters of fact. This was implied in *Nishimura Ekiu* v. *United States*, 142 U. S. 651, relied on by the Government." *Gegiow* v. *Uhl*, 239 U. S. 3, 9 (1915).

beas corpus proceedings brought by aliens challenging Executive interpretations of the immigration laws.[29]

Habeas courts also regularly answered questions of law that arose in the context of discretionary relief. See, *e. g.*, *United States ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260 (1954); *United States ex rel. Hintopoulos* v. *Shaughnessy*, 353 U. S. 72, 77 (1957).[30] Traditionally, courts recognized a distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other hand. See Neuman, 113 Harv. L. Rev., at 1991 (noting the "strong tradition in habeas corpus law . . . that subjects the legally erroneous failure to exercise discretion, unlike a substantively unwise exercise of discretion, to inquiry on the writ"). Eligibility that was "governed by spe-

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[29] See, *e. g.*, *Delgadillo* v. *Carmichael*, 332 U. S. 388, 391 (1947) (rejecting on habeas the Government's interpretation of the statutory term "entry"); *Bridges* v. *Wixon*, 326 U. S. 135, 149 (1945) (rejecting on habeas the Government's interpretation of the term "affiliation" with the Communist Party); *Kessler* v. *Strecker*, 307 U. S. 22, 35 (1939) (holding that "as the Secretary erred in the construction of the statute, the writ must be granted"). Cf. *Mahler* v. *Eby*, 264 U. S. 32, 46 (1924) (reviewing on habeas the question whether the absence of an explicit factual finding that the aliens were "undesirable" invalidated the warrant of deportation).

[30] Indeed, under the pre-1952 regime which provided only what *Heikkila* termed the constitutional minimum of review, on habeas lower federal courts routinely reviewed decisions under the Seventh Proviso, the statutory predecessor to § 212(c), to ensure the lawful exercise of discretion. See, *e. g.*, *United States ex rel. Devenuto* v. *Curran*, 299 F. 206 (CA2 1924); *Hee Fuk Yuen* v. *White*, 273 F. 10 (CA9 1921); *United States ex rel. Patti* v. *Curran*, 22 F. 2d 314 (SDNY 1926); *Gabriel* v. *Johnson*, 29 F. 2d 347 (CA1 1928). During the same period, habeas was also used to review legal questions that arose in the context of the Government's exercise of other forms of discretionary relief under the 1917 Act. See, *e. g.*, *United States ex rel. Adel* v. *Shaughnessy*, 183 F. 2d 371 (CA2 1950); *United States ex rel. Kaloudis* v. *Shaughnessy*, 180 F. 2d 489 (CA2 1950); *Mastrapasqua* v. *Shaughnessy*, 180 F. 2d 999 (CA2 1950); *United States ex rel. de Sousa* v. *Day*, 22 F. 2d 472 (CA2 1927); *Gonzalez-Martinez* v. *Landon*, 203 F. 2d 196 (CA9 1953); *United States ex rel. Berman* v. *Curran*, 13 F. 2d 96 (CA3 1926).

cific statutory standards" provided "a right to a ruling on an applicant's eligibility," even though the actual granting of relief was "not a matter of right under any circumstances, but rather is in all cases a matter of grace." *Jay* v. *Boyd*, 351 U. S. 345, 353–354 (1956). Thus, even though the actual suspension of deportation authorized by § 19(c) of the Immigration Act of 1917 was a matter of grace, in *United States ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260 (1954), we held that a deportable alien had a right to challenge the Executive's failure to exercise the discretion authorized by the law. The exercise of the District Court's habeas corpus jurisdiction to answer a pure question of law in this case is entirely consistent with the exercise of such jurisdiction in *Accardi*. See also *United States ex rel. Hintopoulos* v. *Shaughnessy*, 353 U. S., at 77.

Thus, under the pre-1996 statutory scheme—and consistent with its common-law antecedents—it is clear that St. Cyr could have brought his challenge to the BIA's legal determination in a habeas corpus petition under 28 U. S. C. § 2241. The INS argues, however, that AEDPA and IIRIRA contain four provisions that express a clear and unambiguous statement of Congress' intent to bar petitions brought under § 2241, despite the fact that none of them mention that section. The first of those provisions is AEDPA's § 401(e).

While the title of § 401(e)—"ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS"—would seem to support the INS' submission, the actual text of that provision does not.[31] As we have previously noted, a title alone is not controlling. *Pennsylvania Dept. of Corrections* v. *Yeskey*, 524 U. S. 206,

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[31] The section reads as follows:

"(e) ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS.—Section 106(a) of the Immigration and Nationality Act (8 U. S. C. 1105a(a)) is amended—

"(1) in paragraph (8), by adding 'and' at the end;

"(2) in paragraph (9), by striking '; and' at the end and inserting a period; and

"(3) by striking paragraph (10)." 110 Stat. 1268.

212 (1998) ("'[T]he title of a statute . . . cannot limit the plain meaning of the text. For interpretive purposes, [it is] of use only when [it] shed[s] light on some ambiguous word or phrase'" (quoting *Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U. S. 519, 528–529 (1947))). The actual text of § 401(e), unlike its title, merely repeals a subsection of the 1961 statute amending the judicial review provisions of the 1952 Immigration and Nationality Act. See n. 31, *supra*. Neither the title nor the text makes any mention of 28 U. S. C. § 2241.

Under the 1952 Act, district courts had broad authority to grant declaratory and injunctive relief in immigration cases, including orders adjudicating deportability and those denying suspensions of deportability. See *Foti* v. *INS*, 375 U. S. 217, 225–226 (1963). The 1961 Act withdrew that jurisdiction from the district courts and provided that the procedures set forth in the Hobbs Act would be the "sole and exclusive procedure" for judicial review of final orders of deportation, subject to a series of exceptions. See 75 Stat. 651. The last of those exceptions stated that "any alien held in custody pursuant to an order of deportation may obtain review thereof by habeas corpus proceedings." See *id.*, at 652, codified at 8 U. S. C. § 1105a(10) (repealed Sept. 30, 1996).

The INS argues that the inclusion of that exception in the 1961 Act indicates that Congress must have believed that it would otherwise have withdrawn the pre-existing habeas corpus jurisdiction in deportation cases, and that, as a result, the repeal of that exception in AEDPA in 1996 implicitly achieved that result. It seems to us, however, that the 1961 exception is best explained as merely confirming the limited scope of the new review procedures. In fact, the 1961 House Report provides that this section "in no way disturbs the Habeas Corpus Act."[32] H. R. Rep. No. 1086, 87th Cong., 1st

[32] Moreover, the focus of the 1961 amendments appears to have been the elimination of Administrative Procedure Act (APA) suits that were brought in the district court and that sought declaratory relief. See, *e. g.*,

Sess., 29 (1961). Moreover, a number of the courts that considered the interplay between the general habeas provision and INA § 106(a)(10) after the 1961 Act and before the enactment of AEDPA did not read the 1961 Act's specific habeas provision as supplanting jurisdiction under § 2241. *Orozco* v. *INS*, 911 F. 2d 539, 541 (CA11 1990); *United States ex rel. Marcello* v. *INS*, 634 F. 2d 964, 967 (CA5 1981); *Sotelo Mondragon* v. *Ilchert*, 653 F. 2d 1254, 1255 (CA9 1980).

In any case, whether § 106(a)(10) served as an independent grant of habeas jurisdiction or simply as an acknowledgment of continued jurisdiction pursuant to § 2241, its repeal cannot be sufficient to eliminate what it did not originally grant—namely, habeas jurisdiction pursuant to 28 U. S. C. § 2241.[33] See *Ex parte Yerger*, 8 Wall., at 105–106 (concluding that the repeal of "an additional grant of jurisdiction" does not "operate as a repeal of jurisdiction theretofore allowed"); *Ex parte McCardle*, 7 Wall. 506, 515 (1869) (concluding that the repeal of portions of the 1867 statute conferring appellate jurisdiction on the Supreme Court in habeas proceedings did "not affect the jurisdiction which was previously exercised").

The INS also relies on three provisions of IIRIRA, now codified at 8 U. S. C. §§ 1252(a)(1), 1252(a)(2)(C), and

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H. R. No. 2478, 85th Cong., 2d Sess., 9 (1958) ("[H]abeas corpus is a far more expeditious judicial remedy than that of declaratory judgment"); 104 Cong. Rec. 17173 (1958) (statement of Rep. Walter) (stating that courts would be "relieved of a great burden" once declaratory actions were eliminated and noting that habeas corpus was an "expeditious" means of review).

[33] As the INS acknowledges, the overwhelming majority of Courts of Appeals concluded that district courts retained habeas jurisdiction under § 2241 after AEDPA. See *Goncalves* v. *Reno*, 144 F. 3d 110 (CA1 1998); *Henderson* v. *INS*, 157 F. 3d 106 (CA2 1998); *Sandoval* v. *Reno*, 166 F. 3d 225 (CA3 1999); *Bowrin* v. *INS*, 194 F. 3d 483 (CA4 1999); *Requena-Rodriguez* v. *Pasquarell*, 190 F. 3d 299 (CA5 1999); *Pak* v. *Reno*, 196 F. 3d 666 (CA6 1999); *Shah* v. *Reno*, 184 F. 3d 719 (CA8 1999); *Magana-Pizano* v. *INS*, 200 F. 3d 603 (CA9 1999); *Jurado-Gutierrez* v. *Greene*, 190 F. 3d 1135 (CA10 1999); *Mayers* v. *INS*, 175 F. 3d 1289 (CA11 1999). But see *LaGuerre* v. *Reno*, 164 F. 3d 1035 (CA7 1998).

1252(b)(9) (1994 ed., Supp. V). As amended by § 306 of IIRIRA, 8 U. S. C. § 1252(a)(1) (1994 ed., Supp. V) now provides that, with certain exceptions, including those set out in subsection (b) of the same statutory provision, "[j]udicial review of a final order of removal . . . is governed only by" the Hobbs Act's procedures for review of agency orders in the courts of appeals. Similarly, § 1252(b)(9), which addresses the "[c]onsolidation of questions for judicial review," provides that "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section."[34] Finally, § 1252(a)(2)(C), which concerns "[m]atters not subject to judicial review," states: "Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" certain enumerated criminal offenses.

The term "judicial review" or "jurisdiction to review" is the focus of each of these three provisions. In the immigration context, "judicial review" and "habeas corpus" have historically distinct meanings. See *Heikkila* v. *Barber*, 345 U. S. 229 (1953). In *Heikkila*, the Court concluded that the finality provisions at issue "preclud[ed] judicial review" to the maximum extent possible under the Constitution, and thus concluded that the APA was inapplicable. *Id.*, at 235. Nevertheless, the Court reaffirmed the right to habeas

[34] Title 8 U. S. C. § 1252(g) (1994 ed., Supp. V), entitled "Exclusive jurisdiction," is not relevant to our analysis of the jurisdictional issue. In *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U. S. 471 (1999) *(AADC)*, we explained that that provision applied only to three types of discretionary decisions by the Attorney General—specifically, to commence proceedings, to adjudicate cases, or to execute removal orders—none of which are at issue here.

corpus. *Ibid.* Noting that the limited role played by the courts in habeas corpus proceedings was far narrower than the judicial review authorized by the APA, the Court concluded that "it is the scope of inquiry on habeas corpus that differentiates" habeas review from "judicial review." *Id.*, at 236; see also, *e. g.*, *Terlinden* v. *Ames*, 184 U. S. 270, 278 (1902) (noting that under the extradition statute then in effect there was "no right of review to be exercised by any court or judicial officer," but that limited review on habeas was nevertheless available); *Ekiu*, 142 U. S., at 663 (observing that while a decision to exclude an alien was subject to inquiry on habeas, it could not be "impeached or reviewed"). Both §§ 1252(a)(1) and (a)(2)(C) speak of "judicial review"—that is, full, nonhabeas review. Neither explicitly mentions habeas,[35] or 28 U. S. C. § 2241.[36] Accordingly, neither pro-

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[35] Contrary to the dissent, see *post*, at 330 (opinion of SCALIA, J.), we do not think, given the longstanding distinction between "judicial review" and "habeas," that § 1252(e)(2)'s mention of habeas in the subsection governing "[j]udicial review of orders under section 1225(b)(1)" is sufficient to establish that Congress intended to abrogate the historical distinction between two terms of art in the immigration context when enacting IIRIRA.

"[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them." *Morissette* v. *United States*, 342 U. S. 246, 263 (1952).

At most, § 1252(e)(2) introduces additional statutory ambiguity, but ambiguity does not help the INS in this case. As we noted above, only the clearest statement of congressional intent will support the INS' position. See *supra*, at 305.

[36] It is worth noting that in enacting the provisions of AEDPA and IIRIRA that restricted or altered judicial review, Congress did refer specifically to several different sources of jurisdiction. See, *e. g.*, § 381, 110 Stat. 3009–650 (adding to grant of jurisdiction under 8 U. S. C. § 1329 (1994 ed., Supp. V) a provision barring jurisdiction under that provision

vision speaks with sufficient clarity to bar jurisdiction pursuant to the general habeas statute.

The INS also makes a separate argument based on 8 U. S. C. § 1252(b)(9) (1994 ed., Supp. V). We have previously described § 1252(b)(9) as a "zipper clause." *AADC*, 525 U. S. 471, 483 (1999). Its purpose is to consolidate "judicial review" of immigration proceedings into one action in the court of appeals, but it applies only "[w]ith respect to review of an order of removal under subsection (a)(1)." 8 U. S. C. § 1252(b) (1994 ed., Supp. V).[37] Accordingly, this provision, by its own terms, does not bar habeas jurisdiction over removal orders *not* subject to judicial review under § 1252(a)(1)—including orders against aliens who are removable by reason of having committed one or more criminal offenses. Subsection (b)(9) simply provides for the consolidation of issues to be brought in petitions for "[j]udicial review," which, as we note above, is a term historically dis-

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for suits against the United States or its officers or agents). Section 401(e), which eliminated supplemental habeas jurisdiction under the INA, expressly strikes paragraph 10 of § 106(a) of the INA, *not* 28 U. S. C. § 2241. Similarly, § 306 of IIRIRA, which enacted the new INA § 242, specifically precludes reliance on the provisions of the APA providing for the taking of additional evidence, and imposes specific limits on the availability of declaratory relief. See, *e. g.*, 8 U. S. C. § 1535(e)(2) (1994 ed., Supp. V) (explicitly barring aliens detained under "alien terrorist removal" procedures from seeking "judicial review, including application for a writ of habeas corpus, except for a claim by the alien that continued detention violates the alien's rights under the Constitution"). At no point, however, does IIRIRA make express reference to § 2241. Given the historic use of § 2241 jurisdiction as a means of reviewing deportation and exclusion orders, Congress' failure to refer specifically to § 2241 is particularly significant. Cf. *Chisom* v. *Roemer*, 501 U. S. 380, 396, n. 23 (1991).

[37] As we noted in *AADC*, courts construed the 1961 amendments as channeling review of final orders to the courts of appeals, but still permitting district courts to exercise their traditional jurisdiction over claims that were viewed as being outside of a "final order." 525 U. S., at 485. Read in light of this history, § 1252(b)(9) ensures that review of those types of claims will now be consolidated in a petition for review and considered by the courts of appeals.

tinct from habeas. See *Mahadeo* v. *Reno*, 226 F. 3d 3, 12 (CA1 2000); *Flores-Miramontes* v. *INS*, 212 F. 3d 1133, 1140 (CA9 2000). It follows that § 1252(b)(9) does not clearly apply to actions brought pursuant to the general habeas statute, and thus cannot repeal that statute either in part or in whole.

If it were clear that the question of law could be answered in another judicial forum, it might be permissible to accept the INS' reading of § 1252. But the absence of such a forum, coupled with the lack of a clear, unambiguous, and express statement of congressional intent to preclude judicial consideration on habeas of such an important question of law, strongly counsels against adopting a construction that would raise serious constitutional questions.[38] Cf. *Felker*, 518 U. S., at 660–661. Accordingly, we conclude that habeas jurisdiction under § 2241 was not repealed by AEDPA and IIRIRA.

III

The absence of a clearly expressed statement of congressional intent also pervades our review of the merits of St. Cyr's claim. Two important legal consequences ensued from respondent's entry of a guilty plea in March 1996: (1) He became subject to deportation, and (2) he became eligible for a discretionary waiver of that deportation under the pre-

[38] The dissent argues that our decision will afford more rights to criminal aliens than to noncriminal aliens. However, as we have noted, the scope of review on habeas is considerably more limited than on APA-style review. Moreover, this case raises only a pure question of law as to respondent's statutory eligibility for discretionary relief, not, as the dissent suggests, an objection to the manner in which discretion was exercised. As to the question of timing and congruent means of review, we note that Congress could, without raising any constitutional questions, provide an adequate substitute through the courts of appeals. See, *e. g.*, *Swain* v. *Pressley*, 430 U. S. 372, 381 (1977) ("[T]he substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention" does not violate the Suspension Clause).

vailing interpretation of § 212(c). When IIRIRA went into effect in April 1997, the first consequence was unchanged except for the fact that the term "removal" was substituted for "deportation." The issue that remains to be resolved is whether IIRIRA § 304(b) changed the second consequence by eliminating respondent's eligibility for a waiver.

The INS submits that the statute resolves the issue because it unambiguously communicates Congress' intent to apply the provisions of IIRIRA's Title III–A to all removals initiated after the effective date of the statute, and, in any event, its provisions only operate prospectively and not retrospectively. The Court of Appeals, relying primarily on the analysis in our opinion in *Landgraf* v. *USI Film Products*, 511 U. S. 244 (1994), held, contrary to the INS' arguments, that Congress' intentions concerning the application of the "Cancellation of Removal" procedure are ambiguous and that the statute imposes an impermissible retroactive effect on aliens who, in reliance on the possibility of § 212(c) relief, pleaded guilty to aggravated felonies. See 229 F. 3d, at 416, 420. We agree.

Retroactive statutes raise special concerns. See *Landgraf*, 511 U. S., at 266. "The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals."[39] *Ibid.* Accordingly, "congressional enactments . . . will not be construed to have retroactive effect unless their language requires this

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[39] The INS appears skeptical of the notion that immigrants might be considered an "'unpopular group.'" See Brief for Petitioner 15, n. 8. But see Legomsky, Fear and Loathing in Congress and the Courts: Immigration and Judicial Review, 78 Texas L. Rev. 1615, 1626 (2000) (observing that, because noncitizens cannot vote, they are particularly vulnerable to adverse legislation).

result." *Bowen* v. *Georgetown Univ. Hospital*, 488 U. S. 204, 208 (1988).

> "[This] presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal.' *Kaiser*, 494 U. S., at 855 (SCALIA, J., concurring). In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions." *Landgraf*, 511 U. S., at 265–266 (footnote omitted).

Despite the dangers inherent in retroactive legislation, it is beyond dispute that, within constitutional limits, Congress has the power to enact laws with retrospective effect. See *id.*, at 268. A statute may not be applied retroactively, however, absent a clear indication from Congress that it intended such a result. "Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." *Id.*, at 272–273. Accordingly, the first step in determining whether a statute has an impermissible retroactive effect is to ascertain whether Congress has directed with the requisite clarity that the law be applied retrospectively. *Martin* v. *Hadix*, 527 U. S. 343, 352 (1999).

The standard for finding such unambiguous direction is a demanding one. "[C]ases where this Court has found truly 'retroactive' effect adequately authorized by statute have

involved statutory language that was so clear that it could sustain only one interpretation." *Lindh* v. *Murphy*, 521 U. S. 320, 328, n. 4 (1997). The INS makes several arguments in favor of its position that IIRIRA achieves this high level of clarity.

First, the INS points to the comprehensive nature of IIRIRA's revision of federal immigration law. "Congress's comprehensive establishment of a new immigration framework," the INS argues, "shows its intent that, after a transition period, the provisions of the old law should no longer be applied at all." Brief for Petitioner 33–34. We rejected a similar argument, however, in *Landgraf*, a case that, like this one, involved Congress' comprehensive revision of an important federal statute. 511 U. S., at 260–261. By itself, the comprehensiveness of a congressional enactment says nothing about Congress' intentions with respect to the retroactivity of the enactment's individual provisions.[40]

The INS also points to the effective date for Title III–A as providing a clear statement of congressional intent to apply IIRIRA's repeal of § 212(c) retroactively. See IIRIRA § 309(a), 110 Stat. 3009–625. But the mere promulgation of an effective date for a statute does not provide sufficient assurance that Congress specifically considered the potential unfairness that retroactive application would produce. For that reason, a "statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date." *Landgraf*, 511 U. S., at 257.

The INS further argues that any ambiguity in Congress' intent is wiped away by the "saving provision" in IIRIRA § 309(c)(1), 110 Stat. 3009–625. Brief for Petitioner 34–36. That provision states that, for aliens whose exclusion or deportation proceedings began prior to the Title III–A effec-

[40] The INS' argument that refusing to apply § 304(b) retroactively creates an unrecognizable hybrid of old and new is, for the same reason, unconvincing.

tive date, "the amendments made by [Title III–A] shall not apply, and . . . the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments."[41] This rule, however, does not communicate with unmistakable clarity Congress' intention to apply its repeal of § 212(c) retroactively. Nothing in either § 309(c)(1) or the statute's legislative history even discusses the effect of the statute on proceedings based on pre-IIRIRA convictions that are commenced *after* its effective date.[42] Section 309(c)(1) is best read as merely setting out the *procedural* rules to be applied to removal proceedings pending on the effective date of the statute. Because "[c]hanges in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity," *Landgraf*, 511 U. S., at 275, it was necessary for Congress to identify which set of procedures would apply in those circumstances. As the Conference Report expressly explained, "[§ 309(c)] provides for the transition to new *procedures* in the case of an alien already in exclusion or deportation proceedings on the effective date." H. R. Conf. Rep. No. 104–828, p. 222 (1996) (emphasis added).

Another reason for declining to accept the INS' invitation to read § 309(c)(1) as dictating the temporal reach of IIRIRA § 304(b) is provided by Congress' willingness, in other sections of IIRIRA, to indicate unambiguously its intention

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[41] "(c) TRANSITION FOR ALIENS IN PROCEEDINGS.—

"(1) GENERAL RULE THAT NEW RULES DO NOT APPLY.—Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings as of the title III–A effective date—

"(A) the amendments made by this subtitle shall not apply, and

"(B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments." § 309, 110 Stat. 3009–625.

[42] The INS' reliance, see Reply Brief for Petitioner 12, on *INS* v. *Aguirre-Aguirre*, 526 U. S. 415, 420 (1999), is beside the point because that decision simply observed that the new rules would not apply to a proceeding filed *before* IIRIRA's effective date.

to apply specific provisions retroactively. IIRIRA's amendment of the definition of "aggravated felony," for example, clearly states that it applies with respect to "conviction[s] . . . entered before, on, or after" the statute's enactment date. § 321(b).[43] As the Court of Appeals noted, the fact that Con-

[43] See also IIRIRA § 321(c) ("The amendments made by this section shall apply to actions taken on or after the date of the enactment of this Act, regardless of when the conviction occurred . . ."); § 322(c) ("The amendments made by subsection (a) shall apply to convictions and sentences entered before, on, or after the date of the enactment of this Act"); § 342(b) (the amendment adding incitement of terrorist activity as a ground for exclusion "shall apply to incitement regardless of when it occurs"); § 344(c) (the amendment adding false claims of U. S. citizenship as ground for removal "shall apply to representations made on or after the date" of enactment); § 347(c) (amendments rendering alien excludable or deportable any alien who votes unlawfully "shall apply to voting occurring before, on, or after the date" of enactment); § 348(b) (amendment providing for automatic denial of discretionary waiver from exclusion "shall be effective on the date of the enactment . . . and shall apply in the case of any alien who is in exclusion or deportation proceedings as of such date unless a final administrative order in such proceedings has been entered as of such date"); § 350(b) (amendment adding domestic violence and stalking as grounds for deportation "shall apply to convictions, or violations of court orders, occurring after the date" of enactment); § 351(c) (discussing deportation for smuggling and providing that amendments "shall apply to applications for waivers filed before, on, or after the date" of enactment); § 352(b) (amendments adding renouncement of citizenship to avoid taxation as a ground for exclusion "shall apply to individuals who renounce United States citizenship on and after the date" of enactment); § 380(c) (amendment imposing civil penalties on aliens for failure to depart "shall apply to actions occurring on or after" effective date); § 384(d)(2) (amendments adding penalties for disclosure of information shall apply to "offenses occurring on or after the date" of enactment); § 531(b) (public charge considerations as a ground for exclusion "shall apply to applications submitted on or after such date"); § 604(c) (new asylum provision "shall apply to applications for asylum filed on or after the first day of the first month beginning more than 180 days after the date" of enactment). The INS argues that the Title III–B amendments containing such express temporal provisions are unrelated to the subject matter of § 304(b). Brief for Petitioner 37–38. But it is clear that provisions such as IIRIRA § 321(b), which addresses IIRIRA's redefinition of "aggravated

gress made some provisions of IIRIRA expressly applicable to prior convictions, but did not do so in regard to § 304(b), is an indication "that Congress did not definitively decide the issue of § 304's retroactive application to pre-enactment convictions." See 229 F. 3d, at 415. The "saving provision" is therefore no more significant than the specification of an effective date.

The presumption against retroactive application of ambiguous statutory provisions, buttressed by "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien," *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 449 (1987), forecloses the conclusion that, in enacting § 304(b), "Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits."[44] *Landgraf*, 511 U. S., at 272–273. We therefore proceed to the second step of *Landgraf*'s retroactivity analysis in order to determine whether depriving removable aliens of consideration for § 212(c) relief produces an impermissible retroactive effect for aliens who, like respondent, were convicted pursuant to a plea agreement at a time when their plea would not have rendered them ineligible for § 212(c) relief.[45]

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felony," deal with subjects quite closely related to § 304(b)'s elimination of § 212(c) relief for aliens convicted of aggravated felonies.

[44] The legislative history is significant because, despite its comprehensive character, it contains no evidence that Congress specifically considered the question of the applicability of IIRIRA § 304(b) to pre-IIRIRA convictions. Cf. *Harrison* v. *PPG Industries, Inc.*, 446 U. S. 578, 602 (1980) (REHNQUIST, J., dissenting) ("'In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night'"), cited in *Chisom* v. *Roemer*, 501 U. S., at 396, n. 23 (citing A. Doyle, Silver Blaze, in The Complete Sherlock Holmes 335 (1927)).

[45] The INS argues that we should extend deference under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), to the BIA's interpretation of IIRIRA as applying to all de-

"The inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.'" *Martin*, 527 U. S., at 357–358 (quoting *Landgraf*, 511 U. S., at 270). A statute has retroactive effect when it "'takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past . . . .'"[46] *Id.*, at 269 (quoting *Society for Propagation of the Gospel* v. *Wheeler*, 22 F. Cas. 756, 767 (No. 13,156) (CC NH 1814) (Story, J.)). As we have repeatedly counseled, the judgment whether a particular statute acts retroactively "should be informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" *Martin*, 527 U. S., at 358 (quoting *Landgraf*, 511 U. S., at 270).

IIRIRA's elimination of any possibility of §212(c) relief for people who entered into plea agreements with the expectation that they would be eligible for such relief clearly "'attaches a new disability, in respect to transactions or considerations already past.'" *Id.*, at 269. Plea agreements involve a *quid pro quo* between a criminal defendant and the government. See *Newton* v. *Rumery*, 480 U. S. 386,

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portation proceedings initiated after IIRIRA's effective date. We only defer, however, to agency interpretations of statutes that, applying the normal "tools of statutory construction," are ambiguous. *Id.*, at 843, n. 9; *INS* v. *Cardoza-Fonseca*, 480 U. S., at 447–448. Because a statute that is ambiguous with respect to retroactive application is construed under our precedent to be unambiguously prospective, *Landgraf*, 511 U. S., at 264, there is, for *Chevron* purposes, no ambiguity in such a statute for an agency to resolve.

[46] As we noted in *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U. S. 939 (1997), this language by Justice Story "does not purport to define the outer limit of impermissible retroactivity." *Id.*, at 947. Instead, it simply describes several *"sufficient,"* as opposed to *"necessary,"* conditions for finding retroactivity. *Ibid.*

393, n. 3 (1987). In exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial) and grant the government numerous "tangible benefits, such as promptly imposed punishment without the expenditure of prosecutorial resources."[47] *Ibid.* There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions.[48] See *Magana-Pizano* v. *INS*, 200 F. 3d 603, 612 (CA9 1999) ("That an alien charged with a crime . . . would factor the immigration consequences of conviction in deciding whether to plead or proceed to trial is well-documented"); see also 3 Bender, Criminal Defense Techniques §§ 60A.01, 60A.02[2] (1999) ("'Preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence'" (quoted in Brief for National Association of Criminal Defense Law-

[47] "If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities." *Santobello* v. *New York*, 404 U. S. 257, 260 (1971).

[48] Many States, including Connecticut, the State in which respondent pleaded guilty, require that trial judges advise defendants that immigration consequences may result from accepting a plea agreement. See Cal. Penal Code Ann. § 1016.5 (West 1985); Conn. Gen. Stat. § 54–1j (2001); D. C. Code Ann. § 16–713 (1981–1997); Fla. Rule Crim. Proc. 3.172(c)(8) (1999); Ga. Code Ann. § 17–7–93 (1997); Haw. Rev. Stat. § 802E–2 (1993); Md. Rule 4–242 (2001); Mass. Gen. Laws § 278:29D (1996 Supp.); Minn. Rule Crim. Proc. 15.01 (2000); Mont. Code Ann. § 46–12–210 (1997); N. M. Rule Crim. Form 9–406 (2001); N. Y. Crim. Proc. Law § 220.50(7) (McKinney 2001 Cum. Supp. Pamphlet); N. C. Gen. Stat. § 15A–1022 (1999); Ohio Rev. Code Ann. § 2943.031 (1997); Ore. Rev. Stat. § 135.385 (1997); R. I. Gen. Laws § 12–12–22 (2000); Tex. Code Crim. Proc. Ann., Art. 26.13(a)(4) (Vernon 1989 and Supp. 2001); Wash. Rev. Code § 10.40.200 (1990); Wis. Stat. § 971.08 (1993–1994). And the American Bar Association's Standards for Criminal Justice provide that, if a defendant will face deportation as a result of a conviction, defense counsel "should fully advise the defendant of these consequences." 3 ABA Standards for Criminal Justice 14–3.2 Comment, 75 (2d ed. 1982).

yers et al. as *Amici Curiae* 13)). Given the frequency with which § 212(c) relief was granted in the years leading up to AEDPA and IIRIRA,[49] preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial.[50]

The case of Charles Jideonwo, a petitioner in a parallel litigation in the Seventh Circuit, is instructive. Charged in 1994 with violating federal narcotics law, Jideonwo entered into extensive plea negotiations with the Government, the sole purpose of which was to ensure that "'he got less than five years to avoid what would have been a statutory bar on 212(c) relief.'" *Jideonwo* v. *INS*, 224 F. 3d 692, 699 (CA7 2000) (quoting the Immigration Judge's findings of fact). The potential for unfairness in the retroactive application of IIRIRA § 304(b) to people like Jideonwo and St. Cyr is significant and manifest. Relying upon settled practice, the advice of counsel, and perhaps even assurances in open court that the entry of the plea would not foreclose § 212(c) relief, a great number of defendants in Jideonwo's and St. Cyr's position agreed to plead guilty.[51] Now that prosecutors have received the benefit of these plea agreements, agreements that were likely facilitated by the aliens' belief in their continued eligibility for § 212(c) relief, it would surely be contrary to "familiar considerations of fair notice, reasonable reliance, and settled expectations," *Landgraf*, 511 U. S.,

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[49] See n. 5, *supra*.

[50] Even if the defendant were not initially aware of § 212(c), competent defense counsel, following the advice of numerous practice guides, would have advised him concerning the provision's importance. See Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 6–8.

[51] Ninety percent of criminal convictions today are obtained by guilty plea. See U. S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, Section 5: Judicial Processing of Defendants, in United States Sentencing Commission, 1999 Sourcebook of Criminal Justice Statistics (2000) (Tables 5.30, 5.51).

at 270, to hold that IIRIRA's subsequent restrictions deprive them of any possibility of such relief.[52]

The INS argues that deportation proceedings (and the Attorney General's discretionary power to grant relief from deportation) are "inherently prospective" and that, as a result, application of the law of deportation can never have a retroactive effect. Such categorical arguments are not particularly helpful in undertaking *Landgraf*'s commonsense, functional retroactivity analysis. See *Martin*, 527 U. S., at 359. Moreover, although we have characterized deportation as "look[ing] prospectively to the respondent's right to remain in this country in the future," *INS* v. *Lopez-Mendoza*, 468 U. S. 1032, 1038 (1984), we have done so in order to reject the argument that deportation is punishment for past behavior and that deportation proceedings are therefore subject to the "various protections that apply in the context of a criminal trial." *Ibid.* As our cases make clear, the presumption against retroactivity applies far beyond the confines of the criminal law. See *Landgraf*, 511 U. S., at 272. And our mere statement that deportation is not punishment for past crimes does not mean that we cannot consider an alien's reasonable reliance on the continued availability of discretionary relief from deportation when deciding whether the elimination of such relief has a retroactive effect.[53]

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[52] The significance of that reliance is obvious to those who have participated in the exercise of the discretion that was previously available to delegates of the Attorney General under § 212(c). See *In re Soriano*, 16 BIA Immig. Rptr. B1–227, B1–238 to B1–239 (1996) (Rosenberg, Board Member, concurring and dissenting) ("I find compelling policy and practical reasons to go beyond such a limited interpretation as the one the majority proposes in this case. All of these people, and no doubt many others, had settled expectations to which they conformed their conduct").

[53] We are equally unconvinced by the INS' comparison of the elimination of § 212(c) relief for people like St. Cyr with the Clayton Act's elimination of federal courts' power to enjoin peaceful labor actions. In *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184 (1921), and *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 464 (1921),

Finally, the fact that § 212(c) relief is discretionary does not affect the propriety of our conclusion. There is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation. Cf. *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U. S. 939, 949 (1997) (an increased likelihood of facing a *qui tam* action constitutes an impermissible retroactive effect for the defendant); *Lindsey* v. *Washington*, 301 U. S. 397, 401 (1937) ("Removal of the *possibility* of a sentence of less than fifteen years . . . operates to [defendants'] detriment" (emphasis added)). Prior to AEDPA and IIRIRA, aliens like St. Cyr had a significant likelihood of receiving § 212(c) relief.[54] Because respondent, and other aliens like him, almost certainly relied upon that likelihood in deciding whether to forgo their right to a trial, the elimination of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect.[55]

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we applied the Clayton Act's limitations on injunctive relief to cases pending at the time of the statute's passage. But unlike the elimination of § 212(c) relief in this case, which depends upon an alien's decision to plead guilty to an "aggravated felony," the deprivation of the District Court's power to grant injunctive relief at issue in *Duplex Printing* did not in any way result from or depend on the past action of the party seeking the injunction. Thus, it could not plausibly have been argued that the Clayton Act attached a "'new disability, in respect to transactions or considerations already past.'" *Landgraf*, 511 U. S., at 269.

[54] See n. 5, *supra*.

[55] The INS cites several cases affirming Congress' power to retroactively unsettle such expectations in the immigration context. See Brief for Petitioner 40–41, and n. 21. But our recognition that Congress has the power to act retrospectively in the immigration context sheds no light on the question at issue at this stage of the *Landgraf* analysis: whether a particular statute in fact has such a retroactive effect. Moreover, our decision today is fully consistent with a recognition of Congress' power to act retrospectively. We simply assert, as we have consistently done in the past, that in legislating retroactively, Congress must make its intention plain.

Similarly, the fact that Congress has the power to alter the rights of resident aliens to remain in the United States is not determinative of the question whether a particular statute has a retroactive effect. See *Chew Heong* v. *United States*, 112 U. S. 536 (1884). Applying a statute barring

We find nothing in IIRIRA unmistakably indicating that Congress considered the question whether to apply its repeal of § 212(c) retroactively to such aliens. We therefore hold that § 212(c) relief remains available for aliens, like respondent, whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect.

The judgment is affirmed.

It is so ordered.

JUSTICE O'CONNOR, dissenting.

I join Parts I and III of JUSTICE SCALIA's dissenting opinion in this case. I do not join Part II because I believe that, assuming, *arguendo*, that the Suspension Clause guarantees some minimum extent of habeas review, the right asserted by the alien in this case falls outside the scope of that review for the reasons explained by JUSTICE SCALIA in Part II–B of his dissenting opinion. The question whether the Suspension Clause assures habeas jurisdiction in this particular case properly is resolved on this ground alone, and there is no need to say more.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, and with whom JUSTICE O'CONNOR joins as to Parts I and III, dissenting.

The Court today finds ambiguity in the utterly clear language of a statute that forbids the district court (and all

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Chinese nationals from reentering the country without a certificate prepared when they left to people who exited the country before the statute went into effect would have retroactively unsettled their reliance on the state of the law when they departed. See *id.*, at 559. So too, applying IIRIRA § 304(b) to aliens who pleaded guilty or *nolo contendere* to crimes on the understanding that, in so doing, they would retain the ability to seek discretionary § 212(c) relief would retroactively unsettle their reliance on the state of the law at the time of their plea agreement.

other courts) to entertain the claims of aliens such as respondent St. Cyr, who have been found deportable by reason of their criminal acts. It fabricates a superclear statement, "magic words" requirement for the congressional expression of such an intent, unjustified in law and unparalleled in any other area of our jurisprudence. And as the fruit of its labors, it brings forth a version of the statute that affords *criminal* aliens *more* opportunities for delay-inducing judicial review than are afforded to noncriminal aliens, or even than were afforded to criminal aliens prior to this legislation concededly designed to *expedite* their removal. Because it is clear that the law deprives us of jurisdiction to entertain this suit, I respectfully dissent.

I

In categorical terms that admit of no exception, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 110 Stat. 3009–546, unambiguously repeals the application of 28 U. S. C. § 2241 (the general habeas corpus provision), and of all other provisions for judicial review, to deportation challenges brought by certain kinds of criminal aliens. This would have been readily apparent to the reader, had the Court at the outset of its opinion set forth the relevant provisions of IIRIRA and of its statutory predecessor, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214. I will begin by supplying that deficiency, and explaining IIRIRA's jurisdictional scheme. It begins with what we have called a channeling or "'zipper' clause," *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U. S. 471, 483 (1999)—namely, 8 U. S. C. § 1252(b)(9) (1994 ed., Supp. V). This provision, entitled "Consolidation of questions for judicial review," provides as follows:

> "Judicial review of *all* questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from *any action taken*

> *or proceeding brought to remove an alien* from the United States under this subchapter shall be available *only* in judicial review of a final order under this section." (Emphases added.)

In other words, *if* any review is available of any "questio[n] of law . . . arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter," it is available "only in judicial review of a final order under this section [§ 1252]." What kind of review does that section provide? That is set forth in § 1252(a)(1), which states:

> "Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to [the expedited-removal provisions for undocumented aliens arriving at the border found in] section 1225(b)(1) of this title) is governed only by chapter 158 of title 28 [the Hobbs Act], except as provided in subsection (b) of this section [which modifies some of the Hobbs Act provisions] and except that the court may not order the taking of additional evidence under section 2347(c) of [Title 28]."

In other words, *if* judicial review is available, it consists *only* of the modified Hobbs Act review specified in § 1252(a)(1).

In some cases (including, as it happens, the one before us), there can be no review at all, because IIRIRA categorically and unequivocally rules out judicial review of challenges to deportation brought by certain kinds of criminal aliens. Section 1252(a)(2)(C) provides:

> "Notwithstanding *any* other provision of law, *no court* shall have jurisdiction to review *any* final order of removal against an alien who is removable by reason of having committed [one or more enumerated] criminal offense[s] [including drug-trafficking offenses of the sort of which respondent had been convicted]." (Emphases added.)

Finally, the pre-IIRIRA antecedent to the foregoing provisions—AEDPA § 401(e)—and the statutory background against which that was enacted, confirm that § 2241 habeas review, in the district court or elsewhere, has been unequivocally repealed. In 1961, Congress amended the Immigration and Nationality Act of 1952 (INA), 66 Stat. 163, by directing that the procedure for Hobbs Act review in the courts of appeals "shall apply to, and shall be the *sole and exclusive procedure for*, the judicial review of all final orders of deportation" under the INA. 8 U. S. C. § 1105a(a) (repealed Sept. 30, 1996) (emphasis added). Like 8 U. S. C. § 1252(a)(2)(C) (1994 ed., Supp. V), this provision squarely prohibited § 2241 district-court habeas review. At the same time that it enacted this provision, however, the 1961 Congress enacted a specific exception: "any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings," 8 U. S. C. § 1105a(a)(10) (1994 ed.). (This would of course have been surplusage had § 2241 habeas review not been covered by the "sole and exclusive procedure" provision.) Section 401(e) of AEDPA repealed this narrow exception, and there is no doubt what the repeal was thought to accomplish: the provision was entitled "ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS." 110 Stat. 1268. It gave universal preclusive effect to the "sole and exclusive procedure" language of § 1105a(a). And it is this regime that IIRIRA has carried forward.

The Court's efforts to derive ambiguity from this utmost clarity are unconvincing. First, the Court argues that §§ 1252(a)(2)(C) and 1252(b)(9) are not as clear as one might think—that, even though they are sufficient to repeal the jurisdiction of the courts of appeals, see *Calcano-Martinez* v. *INS*, *post*, at 351–352,[1] they do not cover habeas jurisdiction in the district court, since, "[i]n the immigration context, 'judicial review' and 'habeas corpus' have historically dis-

[1] In the course of this opinion I shall refer to some of the Court's analysis in this companion case; the two opinions are intertwined.

tinct meanings," *ante*, at 311, 312, n. 35. Of course § 1252(a)(2)(C) does not even *use* the term "judicial review" (it says "jurisdiction to review")—but let us make believe it does. The Court's contention that in *this* statute it does not include habeas corpus is decisively refuted by the language of § 1252(e)(2), enacted along with §§ 1252(a)(2)(C) and 1252(b)(9): "*Judicial review* of any determination made under section 1225(b)(1) of this title [governing review of expedited removal orders against undocumented aliens arriving at the border] is available in *habeas corpus* proceedings . . . ." (Emphases added.) It is hard to imagine how Congress could have made it any clearer that, when it used the term "judicial review" in IIRIRA, it included judicial review through habeas corpus. Research into the "historical" usage of the term "judicial review" is thus quite beside the point.

But the Court is demonstrably wrong about that as well. Before IIRIRA was enacted, from 1961 to 1996, the governing immigration statutes unquestionably treated "judicial review" as encompassing review by habeas corpus. As discussed earlier, 8 U. S. C. § 1105a (1994 ed.) made Hobbs Act review "the sole and exclusive procedure for, the *judicial review* of all final orders of deportation" (emphasis added), but created (in subsection (a)(10)) a limited exception for habeas corpus review. Section 1105a was entitled "*Judicial review* of orders of deportation and exclusion" (emphasis added), and the exception for habeas corpus stated that "any alien held in custody pursuant to an order of deportation may obtain *judicial review* thereof by *habeas corpus* proceedings," § 1105a(a)(10) (emphases added). Apart from this prior statutory usage, many of our own immigration cases belie the Court's suggestion that the term "judicial review," when used in the immigration context, does not include review by habeas corpus. See, *e. g.*, *United States* v. *Mendoza-Lopez*, 481 U. S. 828, 836–837 (1987) ("[A]ny alien held in custody pursuant to an order of deportation may ob-

tain *judicial review* of that order in a *habeas corpus* proceeding" (emphases added)); *Shaughnessy* v. *Pedreiro*, 349 U. S. 48, 52 (1955) ("Our holding is that there is a right of *judicial review* of deportation orders *other than by habeas corpus* . . ." (emphases added)); see also *id.*, at 49.

The *only* support the Court offers in support of the asserted "longstanding distinction between 'judicial review' and 'habeas,'" *ante*, at 312, n. 35, is language from a single opinion of this Court, *Heikkila* v. *Barber*, 345 U. S. 229 (1953).[2] There, we "differentiate[d]" "habeas corpus" from "judicial review *as that term is used in the Administrative Procedure Act.*" *Id.*, at 236 (emphasis added). But that simply asserts that habeas corpus review is different from ordinary APA review, which no one doubts. It does *not* assert that habeas corpus review is not judicial review *at all*. Nowhere does *Heikkila* make such an implausible contention.[3]

[2] The recent Circuit authorities cited by the Court, which postdate IIRIRA, see *Mahadeo* v. *Reno*, 226 F. 3d 3, 12 (CA1 2000); and *Flores-Miramontes* v. *INS*, 212 F. 3d 1133, 1140 (CA9 2000)), cited *ante*, at 314, hardly demonstrate any historical usage upon which IIRIRA was based. Anyway, these cases rely for their analysis upon a third Court of Appeals decision—*Sandoval* v. *Reno*, 166 F. 3d 225, 235 (CA3 1999)—which simply relies on the passage from *Heikkila* under discussion.

[3] The older, pre-1961 judicial interpretations relied upon by the Court, see *ante*, at 312, are similarly unavailing. *Ekiu* v. *United States*, 142 U. S. 651 (1892), never purported to distinguish "judicial review" from habeas, and the Court's attempt to extract such a distinction from the opinion is unpersuasive. *Ekiu* did state that the statute "prevent[ed] the question of an alien immigrant's right to land, when once decided adversely by an inspector, acting within the jurisdiction conferred upon him, from being *impeached or reviewed*," *id.*, at 663 (emphasis added; italicized words quoted *ante*, at 312); but the clear implication was that the question whether the inspector was "acting within the jurisdiction conferred upon him" *was* reviewable. The distinction pertained, in short, to the *scope* of judicial review on habeas—not to whether judicial review was available. *Terlinden* v. *Ames*, 184 U. S. 270, 278 (1902), likewise drew no distinction between "judicial review" and habeas; it simply stated that the extradition statute "gives no right of review to be exercised by any court

The Court next contends that the zipper clause, § 1252(b)(9), "by its own terms, does not bar" § 2241 district-court habeas review of removal orders, *ante*, at 313, because the opening sentence of subsection (b) states that "[w]ith respect to review of an order of removal *under subsection (a)(1) of this section*, the following requirements apply . . . ." (Emphasis added.) But in the broad sense, § 1252(b)(9) *does* "apply" "to review of an order of removal under subsection (a)(1)," because it mandates that "review of all questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter" must take place *in connection with* such review. This is "application" enough—and to insist that subsection (b)(9) be given effect only *within* the review of removal orders that takes place under subsection (a)(1), is to render it meaningless. Moreover, other of the numbered subparagraphs of subsection (b) make clear that the introductory sentence does not at all operate as a limitation upon what follows. Subsection (b)(7) specifies the procedure by which "a defendant in a criminal proceeding" charged with failing to depart after being ordered to do so may contest "the validity of [a removal] order" before trial; and subsection (b)(8) prescribes some of the prerogatives and responsibilities of the Attorney General and the alien after entry of a final removal order. These provisions have no effect if they must apply (even in the broad sense that subsection (b)(9) can be said to apply) "to review of an order of removal under subsection (a)(1)."

Unquestionably, unambiguously, and unmistakably, IIRIRA expressly supersedes § 2241's general provision for habeas jurisdiction. The Court asserts that *Felker* v. *Turpin*, 518 U. S. 651 (1996), and *Ex parte Yerger*, 8 Wall. 85

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or judicial officer, and what cannot be done directly [under the extradition statute] cannot be done indirectly through the writ of *habeas corpus*." Far from saying that habeas is *not* a form of judicial review, it says that habeas *is* an *indirect* means of review.

(1869), reflect a "longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction," *ante*, at 298. They do no such thing. Those cases simply applied the general principle—not unique to habeas—that "[r]epeals by implication are not favored." *Felker*, *supra*, at 660; *Yerger*, *supra*, at 105. *Felker* held that a statute which by its terms prohibited only further review by this Court (or by an en banc court of appeals) of a court-of-appeals panel's "'grant or denial of . . . authorization . . . to file a second or successive [habeas] application,'" 518 U. S., at 657 (quoting 28 U. S. C. §2244(b)(3)(E) (1994 ed., Supp. II)), should not be read to imply the repeal of this Court's separate and distinct "authority [under 28 U. S. C. §2241 and 28 U. S. C. §2254 (1994 ed. and Supp. V)] to hear habeas petitions filed as original matters in this Court," 518 U. S., at 661. *Yerger* held that an 1868 Act that by its terms "repeal[ed] only so much of the act of 1867 as authorized appeals, or the exercise of appellate jurisdiction by this court," should be read to "reach no [further than] the act of 1867," and did not repeal by implication the appellate jurisdiction conferred by the Judiciary Act of 1789 and other pre-1867 enactments. 8 Wall., at 105. In the present case, unlike in *Felker* and *Yerger*, none of the statutory provisions relied upon—§ 1252(a)(2)(C), § 1252(b)(9), or 8 U. S. C. § 1105a(a) (1994 ed.)—requires us to imply from one statutory provision the repeal of another. All *by their terms* prohibit the judicial review at issue in this case.

The Court insists, however, that since "[n]either [§ 1252(a)(1) nor § 1252(a)(2)(C)] explicitly mentions habeas, or 28 U. S. C. §2241," "neither provision speaks with sufficient clarity to bar jurisdiction pursuant to the general habeas statute." *Ante*, at 312–313. Even in those areas of our jurisprudence where we *have* adopted a "clear statement" rule (notably, the sovereign immunity cases to which the Court adverts, *ante*, at 299, n. 10), clear statement has never meant the kind of magic words demanded by the Court

today—explicit reference to habeas or to § 2241—rather than reference to "judicial review" in a statute that explicitly calls habeas corpus a form of judicial review. In *Gregory* v. *Ashcroft*, 501 U. S. 452, 467 (1991), we said:

> "This [the Court's clear-statement requirement] does not mean that the [Age Discrimination in Employment] Act must mention [state] judges explicitly, though it does not. Cf. *Dellmuth* v. *Muth*, 491 U. S. 223, 233 (1989) (SCALIA, J., concurring). Rather, it must be plain to anyone reading the Act that it covers judges."

In *Gregory*, as in *United States* v. *Nordic Village, Inc.*, 503 U. S. 30, 34–35 (1992), and *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 241, 246 (1985), we held that the clear-statement requirement was not met, not because there was no explicit reference to the Eleventh Amendment, but because the statutory intent to eliminate state sovereign immunity *was not clear*. For the reasons discussed above, the intent to eliminate habeas jurisdiction in the present case is entirely clear, and that is all that is required.

It has happened before—too frequently, alas—that courts have distorted plain statutory text in order to produce a "more sensible" result. The unique accomplishment of today's opinion is that the result it produces is as far removed from what is sensible as its statutory construction is from the language of the text. One would have to study our statute books for a long time to come up with a more unlikely disposition. By authorizing § 2241 habeas review in the district court but foreclosing review in the court of appeals, see *Calcano-Martinez*, *post*, at 351–352, the Court's interpretation routes all legal challenges to removal orders brought by criminal aliens to the district court, to be adjudicated under that court's § 2241 habeas authority, which specifies no time limits. After review by that court, criminal aliens will presumably have an appeal as of right to the court of appeals, and can then petition this Court for a writ of cer-

tiorari. In contrast, noncriminal aliens seeking to challenge their removal orders—for example, those charged with having been inadmissible at the time of entry, with having failed to maintain their nonimmigrant status, with having procured a visa through a marriage that was not bona fide, or with having become, within five years after the date of entry, a public charge, see 8 U. S. C. §§ 1227(a)(1)(A), (a)(1)(C), (a)(1)(G), (a)(5) (1994 ed., Supp. V)—will still presumably be required to proceed directly to the court of appeals by way of petition for review, under the restrictive modified Hobbs Act review provisions set forth in § 1252(a)(1), including the 30-day filing deadline, see § 1252(b)(1). In fact, prior to the enactment of IIRIRA, criminal aliens also had to follow this procedure for immediate modified Hobbs Act review in the court of appeals. See 8 U. S. C. § 1105a(a) (1994 ed.). The Court has therefore succeeded in perverting a statutory scheme designed to *expedite* the removal of criminal aliens into one that now affords them *more* opportunities for (and layers of) judicial review (and hence more opportunities for delay) than are afforded *non*-criminal aliens—and more than were afforded criminal aliens prior to the enactment of IIRIRA.[4] This outcome speaks for itself; no Congress ever imagined it.

To excuse the violence it does to the statutory text, the Court invokes the doctrine of constitutional doubt, which it asserts is raised by the Suspension Clause, U. S. Const., Art. I, § 9, cl. 2. This uses one distortion to justify another, transmogrifying a doctrine designed to maintain "a just re-

[4] The Court disputes this conclusion by observing that "the scope of review on habeas is considerably more limited than on APA-style review," *ante*, at 314, n. 38 (a statement, by the way, that confirms our contention that habeas is, along with the Administrative Procedure Act (APA), one form of judicial review). It is more limited, to be sure—but not "considerably more limited" in any respect that would disprove the fact that criminal aliens are much better off than others. In all the many cases that (like the present one) involve "question[s] of law," *ibid.*, the Court's statutory misconstruction gives criminal aliens a preferred position.

spect for the legislature," *Ex parte Randolph*, 20 F. Cas. 242, 254 (No. 11,558) (CC Va. 1833) (Marshall, C. J., on circuit), into a means of thwarting the clearly expressed intent of the legislature. The doctrine of constitutional doubt is meant to effectuate, not to subvert, congressional intent, by giving *ambiguous* provisions a meaning that will avoid constitutional peril, and that will conform with Congress's presumed intent not to enact measures of dubious validity. The condition precedent for application of the doctrine is that the statute can *reasonably be construed* to avoid the constitutional difficulty. See, *e. g.*, *Miller* v. *French*, 530 U. S. 327, 341 (2000) ("'We cannot press statutory construction "to the point of disingenuous evasion" even to avoid a constitutional question'" (quoting *United States* v. *Locke*, 471 U. S. 84, 96 (1985), in turn quoting *George Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 379 (1933))); *Salinas* v. *United States*, 522 U. S. 52, 60 (1997) (quoting *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 57, n. 9 (1996)). It is a device for interpreting what the statute says—not for *ignoring* what the statute says in order to avoid the trouble of determining whether what it says is unconstitutional. For the reasons I have set forth above, it is crystal clear that the statute before us here bars criminal aliens from obtaining judicial review, including § 2241 district-court review, of their removal orders. It is therefore also crystal clear that the doctrine of constitutional doubt has no application.

In the remainder of this opinion I address the question the Court *should* have addressed: Whether these provisions of IIRIRA are unconstitutional.

II

A

The Suspension Clause of the Constitution, Art. I, § 9, cl. 2, provides as follows:

> "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

A straightforward reading of this text discloses that it does not guarantee any content to (or even the existence of) the writ of habeas corpus, but merely provides that the writ shall not (except in case of rebellion or invasion) be suspended. See R. Fallon, D. Meltzer, & D. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 1369 (4th ed. 1996) ("[T]he text [of the Suspension Clause] does not confer a right to habeas relief, but merely sets forth when the 'Privilege of the Writ' may be suspended"). Indeed, that was precisely the objection expressed by four of the state ratifying conventions—that the Constitution failed affirmatively to guarantee a right to habeas corpus. See Collings, Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?, 40 Calif. L. Rev. 335, 340, and nn. 39–41 (1952) (citing 1 J. Elliott, Debates on the Federal Constitution 328 (2d ed. 1836) (New York); 3 *id.*, at 658 (Virginia); 4 *id.*, at 243 (North Carolina); 1 *id.*, at 334 (Rhode Island)).

To "suspend" the writ was not to fail to enact it, much less to refuse to accord it particular content. Noah Webster, in his American Dictionary of the English Language, defined it—with patriotic allusion to the constitutional text—as "[t]o cause to cease for a time from operation or effect; as, to *suspend* the habeas corpus act." Vol. 2, p. 86 (1828 ed.). See also N. Bailey, An Universal Etymological English Dictionary (1789) ("To Suspend [in *Law*] signifies a temporal stop of a man's right"); 2 S. Johnson, A Dictionary of the English Language 1958 (1773) ("to make to stop for a time"). This was a distinct abuse of majority power, and one that had manifested itself often in the Framers' experience: temporarily but entirely eliminating the "Privilege of the Writ" for a certain geographic area or areas, or for a certain class

or classes of individuals. Suspension Acts had been adopted (and many more proposed) both in this country and in England during the late 18th century, see B. Mian, American Habeas Corpus: Law, History, and Politics 109–127 (1984)—including a 7-month suspension by the Massachusetts Assembly during Shay's Rebellion in 1787, *id.*, at 117. Typical of the genre was the prescription by the Statute of 1794, 34 Geo. 3, c. 54, § 2, that "'[an Act for preventing wrongous imprisonment, and against undue delays in trials], insofar as the same may be construed to relate to the cases of Treason and suspicion of Treason, be suspended [for one year] . . . .'" Mian, *supra*, at 110. See also 16 Annals of Cong. 44, 402–425 (1852) (recording the debate on a bill, reported to the House of Representatives from the Senate on January 26, 1807, and ultimately rejected, to "suspen[d], for and during the term of three months," "the privilege of the writ of *habeas corpus*" for "any person or persons, charged on oath with treason, misprision of treason," and other specified offenses arising out of the Aaron Burr conspiracy).

In the present case, of course, Congress has not temporarily withheld operation of the writ, but has permanently altered its content. That is, to be sure, an act subject to majoritarian abuse, as is Congress's framing (or its determination not to frame) a habeas statute in the first place. But that is not the majoritarian abuse against which the Suspension Clause was directed. It is no more irrational to guard against the common and well known "suspension" abuse, without guaranteeing any particular habeas right that enjoys immunity from suspension, than it is, in the Equal Protection Clause, to guard against unequal application of the laws, without guaranteeing any particular law which enjoys *that* protection. And it is no more acceptable for this Court to write a habeas law, in order that the Suspension Clause might have some effect, than it would be for this Court to write other laws, in order that the Equal Protection Clause might have some effect.

The Court cites many cases which it says establish that it is a "serious and difficult constitutional issue," *ante*, at 305, whether the Suspension Clause prohibits the elimination of habeas jurisdiction effected by IIRIRA. Every one of those cases, however, pertains not to the meaning of the Suspension Clause, but to the content of the habeas corpus provision of the United States Code, which is quite a different matter. The closest the Court can come is a statement in one of those cases to the effect that the Immigration Act of 1917 "had the effect of precluding judicial intervention in deportation cases except insofar as it was required by the Constitution," *Heikkila*, 345 U. S., at 234–235. That statement (1) was pure dictum, since the Court went on to hold that the judicial review of petitioner's deportation order was unavailable; (2) does not specify to *what* extent judicial review *was* "required by the Constitution," which could (as far as the Court's holding was concerned) be zero; and, most important of all, (3) does not refer to the Suspension Clause, so could well have had in mind the due process limitations upon the procedures for determining deportability that our later cases establish, see Part III, *infra*.

There is, however, another Supreme Court dictum that is unquestionably in point—an unusually authoritative one at that, since it was written by Chief Justice Marshall in 1807. It supports precisely the interpretation of the Suspension Clause I have set forth above. In *Ex parte Bollman*, 4 Cranch 75, one of the cases arising out of the Burr conspiracy, the issue presented was whether the Supreme Court had the power to issue a writ of habeas corpus for the release of two prisoners held for trial under warrant of the Circuit Court of the District of Columbia. Counsel for the detainees asserted not only statutory authority for issuance of the writ, but inherent power. See *id.*, at 77–93. The Court would have nothing to do with that, whether under Article III or any other provision. While acknowledging an inherent power of the courts "over their own officers, or

to protect themselves, and their members, from being disturbed in the exercise of their functions," Marshall says that "the power of taking cognizance of any question between individuals, or between the government and individuals,"

> "must be given by written law.
>
> "The inquiry, therefore, on this motion will be, whether by any statute compatible with the constitution of the United States, the power to award a writ of *habeas corpus*, in such a case as that of Erick Bollman and Samuel Swartwout, has been given to this court." *Id.*, at 94.

In the ensuing discussion of the Judiciary Act of 1789, the opinion specifically addresses the Suspension Clause—not invoking it as a source of habeas jurisdiction, but to the contrary pointing out that without *legislated* habeas jurisdiction the Suspension Clause would have no effect.

> "It may be worthy of remark, that this act was passed by the first congress of the United States, sitting under a constitution which had declared 'that the privilege of the writ of *habeas corpus* should not be suspended, unless when, in cases of rebellion or invasion, the public safety might require it.'
>
> "Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they give to all the courts the power of awarding writs of *habeas corpus*." *Id.*, at 95.[5]

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[5] The Court claims that I "rea[d] into Chief Justice Marshall's opinion in *Ex parte Bollman* . . . support for a proposition that the Chief Justice did not endorse, either explicitly or implicitly," *ante*, at 304, n. 24. Its support for this claim is a highly selective quotation from the opinion,

There is no more reason for us to believe, than there was for the Marshall Court to believe, that the Suspension Clause means anything other than what it says.

B

Even if one were to assume that the Suspension Clause, despite its text and the Marshall Court's understanding, guarantees some constitutional minimum of habeas relief, that minimum would assuredly not embrace the rarified right asserted here: the right to judicial compulsion of the exercise of Executive *discretion* (which may be exercised favorably or unfavorably) regarding a prisoner's release. If one reads the Suspension Clause as a guarantee of habeas relief, the obvious question presented is: *What* habeas relief? There are only two alternatives, the first of which is too absurd to be seriously entertained. It could be contended that Congress "suspends" the writ whenever it eliminates *any* prior ground for the writ that it adopted. Thus, if Congress should ever (in the view of this Court) have authorized immediate habeas corpus—without the need to exhaust administrative remedies—for a person arrested as an illegal alien, Congress would *never* be able (in the light of sad experience) to revise that disposition. The Suspen-

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see *ibid.* There is nothing "implici[t]" whatsoever about Chief Justice Marshall's categorical statement that "the power to award the writ [of habeas corpus] by any of the courts of the United States, must be given by written law," 4 Cranch, at 94. See also *ibid.*, quoted *supra*, at 340 ("[T]he power of taking cognizance of any question between individuals, or between the government and individuals . . . must be given by written law"). If, as the Court concedes, "the writ could not be suspended," *ante*, at 304, n. 24, within the meaning of the Suspension Clause until Congress affirmatively provided for habeas by statute, then surely Congress may subsequently alter what it had initially provided for, lest the Clause become a one-way ratchet, see *infra* this page and 342. The Court's position that a permanent repeal of habeas jurisdiction is unthinkable (and hence a violation of the Suspension Clause) is simply incompatible with its (and Marshall's) belief that a failure to confer habeas jurisdiction is *not* unthinkable.

sion Clause, in other words, would be a one-way ratchet that enshrines in the Constitution every grant of habeas jurisdiction. This is, as I say, too absurd to be contemplated, and I shall contemplate it no further.

The other alternative is that the Suspension Clause guarantees the common-law right of habeas corpus, as it was understood when the Constitution was ratified. There is no doubt whatever that this did not include the right to obtain discretionary release. The Court notes with apparent credulity respondent's contention "that there is historical evidence of the writ issuing to redress the improper exercise of official discretion," *ante*, at 303–304. The only framing-era or earlier cases it alludes to in support of that contention, see *ante*, at 303, n. 23, referred to *ante*, at 303–304, establish no such thing. In *Ex parte Boggin*, 13 East 549, 104 Eng. Rep. 484 (K. B. 1811), the court did not even bother calling for a response from the custodian, where the applicant failed to show that he was statutorily exempt from impressment under any statute then in force. In *Chalacombe's Case*, reported in a footnote in *Ex parte Boggin*, the court did "let the writ go"—*i. e.*, called for a response from the Admiralty to Chalacombe's petition—even though counsel for the Admiralty had argued that the Admiralty's general policy of not impressing "seafaring persons of [Chalacombe's] description" was "a matter of grace and favour, [and not] of right." But the court never decided that it had authority to grant the relief requested (since the Admiralty promptly discharged Chalacombe of its own accord); in fact, it expressed doubt whether it had that authority. See 13 East, at 550, n. (b), 104 Eng. Rep., at 484, n. (a)[2] (Lord Ellenborough, C. J.) ("[C]onsidering it merely as a question of discretion, is it not more fit that this should stand over for the consideration of the Admiralty, to whom the matter ought to be disclosed?"). And in *Hollingshead's Case*, 1 Salkeld 351, 91 Eng. Rep. 307 (K. B. 1702), the "warrant of commitment" issued by the "commissioners of bankrupt" was "held naught," since it au-

thorized the bankrupt's continued detention by the commissioners until "otherwise discharged by due course of law," whereas the statute authorized commitment only "till [the bankrupt] submit himself to be examined by the commissioners." (Emphasis deleted.) There is nothing pertaining to executive discretion here.

All the other framing-era or earlier cases cited in the Court's opinion—indeed, *all the later Supreme Court cases until United States ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260, *in 1954*—provide habeas relief from executive detention only when the custodian had no legal authority to detain. See 3 J. Story, Commentaries on the Constitution of the United States § 1333, p. 206 (1833) (the writ lies to ascertain whether a "sufficient ground of detention appears"). The fact is that, far from forming a traditional basis for issuance of the writ of habeas corpus, the whole "concept of 'discretion' was not well developed at common law," Hafetz, The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts, 107 Yale L. J. 2509, 2534 (1998), quoted in Brief for Respondent in *Calcano-Martinez* v. *INS*, O. T. 2000, No. 00–1011, p. 37. An exhaustive search of cases antedating the Suspension Clause discloses few instances in which courts even discussed the concept of executive discretion; and on the rare occasions when they did, they simply confirmed what seems obvious from the paucity of such discussions—namely, that courts understood executive discretion as lying entirely beyond the judicial ken. See, *e. g.*, *Chalacombe's Case*, *supra*, at 342. That is precisely what one would expect, since even the executive's evaluation of the *facts*—a duty that was a good deal *more* than discretionary—was not subject to review on habeas. Both in this country, until passage of the Habeas Corpus Act of 1867, and in England, the longstanding rule had been that the truth of the custodian's return *could not be controverted.* See, *e. g.*, *Opinion on the Writ of Habeas Corpus*, Wilm. 77, 107, 97 Eng. Rep. 29, 43 (H. L. 1758); Note, Developments in

the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1113–1114, and nn. 9–11 (1970) (quoting Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385); Oaks, Legal History in the High Court—Habeas Corpus, 64 Mich. L. Rev. 451, 453 (1966). And, of course, going beyond inquiry into the legal authority of the executive to detain would have been utterly incompatible with the well-established limitation upon habeas relief for a convicted prisoner: "[O]nce a person had been convicted by a superior court of general jurisdiction, a court disposing of a habeas corpus petition could not go behind the conviction for any purpose other than to verify the formal jurisdiction of the committing court." *Id.*, at 468, quoted in *Swain* v. *Pressley*, 430 U. S. 372, 384–385 (1977) (Burger, C. J., concurring in part and concurring in judgment).

In sum, there is no authority whatever for the proposition that, at the time the Suspension Clause was ratified—or, for that matter, even for a century and a half thereafter—habeas corpus relief was available to compel the Executive's allegedly wrongful refusal to exercise discretion. The striking proof of that proposition is that when, in 1954, the Warren Court held that the Attorney General's alleged refusal to exercise his discretion under the Immigration Act of 1917 could be reviewed on habeas, see *United States ex rel. Accardi* v. *Shaughnessy*, *supra*, it did so without citation of *any* supporting authority, and over the dissent of Justice Jackson, joined by three other Justices, who wrote:

> "Of course, it may be thought that it would be better government if even executive acts of grace were subject to judicial review. But the process of the Court seems adapted only to the determination of legal rights, and here the decision is thrusting upon the courts the task of reviewing a discretionary and purely executive function. Habeas corpus, like the currency, can be debased by over-issue quite as certainly as by too niggardly use. We would . . . leave the responsibility for suspension or

execution of this deportation squarely on the Attorney General, where Congress has put it." *Id.*, at 271.

III

Given the insubstantiality of the due process and Article III arguments against barring judicial review of respondent's claim (the Court does not even bother to mention them, and the Court of Appeals barely acknowledges them), I will address them only briefly.

The Due Process Clause does not "[r]equir[e] [j]udicial [d]etermination [o]f" respondent's claim, Brief for Petitioners in *Calcano-Martinez* v. *INS*, O. T. 2000, No. 00–1011, p. 34. Respondent has no legal entitlement to suspension of deportation, no matter how appealing his case. "[T]he Attorney General's suspension of deportation [is] "an act of grace" which is accorded pursuant to her 'unfettered discretion,' *Jay* v. *Boyd*, 351 U. S. 345, 354 (1956) . . . , and [can be likened, as Judge Learned Hand observed,] to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict," 351 U. S., at 354, n. 16 . . . ." *INS* v. *Yueh-Shaio Yang*, 519 U. S. 26, 30 (1996). The furthest our cases have gone in imposing due process requirements upon analogous exercises of Executive discretion is the following. (1) We have required "*minimal* procedural safeguards" for death-penalty clemency proceedings, to prevent them from becoming so capricious as to involve "a state official flipp[ing] a coin to determine whether to grant clemency," *Ohio Adult Parole Authority* v. *Woodard*, 523 U. S. 272, 289 (1998) (O'CONNOR, J., concurring in part and concurring in judgment). Even assuming that this holding is not part of our "death-is-different" jurisprudence, *Shafer* v. *South Carolina*, 532 U. S. 36, 55 (2001) (SCALIA, J., dissenting) (citation omitted), respondent here is not complaining about the absence of procedural safeguards; he disagrees with the Attorney General's judgment on a point of law. (2) We have recognized the existence of a due process liberty interest when

a State's statutory parole procedures prescribe that a prisoner "shall" be paroled if certain conditions are satisfied, see *Board of Pardons* v. *Allen*, 482 U. S. 369, 370–371, 381 (1987); *Greenholtz* v. *Inmates of Neb. Penal and Correctional Complex*, 442 U. S. 1, 12 (1979). There is no such statutory *entitlement* to suspension of deportation, no matter what the facts. Moreover, in neither *Woodard*, nor *Allen*, nor *Greenholtz* did we intimate that the Due Process Clause conferred jurisdiction of its own force, without benefit of statutory authorization. All three cases were brought under 42 U. S. C. § 1983.

Article III, § 1's investment of the "judicial Power of the United States" in the federal courts does not prevent Congress from committing the adjudication of respondent's legal claim wholly to "non-Article III federal adjudicative bodies," Brief for Petitioners in *Calcano-Martinez* v. *INS*, O. T. 2000, No. 00–1011, at 38. The notion that Article III requires every Executive determination, on a question of law or of fact, to be subject to judicial review has no support in our jurisprudence. Were it correct, the doctrine of sovereign immunity would not exist, and the APA's general permission of suits challenging administrative action, see 5 U. S. C. § 702, would have been superfluous. Of its own force, Article III does no more than commit to the courts matters that are "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789," *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 90 (1982) (REHNQUIST, J., concurring in judgment)—which (as I have discussed earlier) did not include supervision of discretionary Executive action.

* * *

The Court has created a version of IIRIRA that is not only unrecognizable to its framers (or to anyone who can read) but gives the statutory scheme precisely the *opposite* of its intended effect, affording criminal aliens *more* opportu-

nities for delay-inducing judicial review than others have, or even than criminal aliens had prior to the enactment of this legislation. Because § 2241's exclusion of judicial review is unmistakably clear, and unquestionably constitutional, both this Court and the courts below were without power to entertain respondent's claims. I would set aside the judgment of the court below and remand with instructions to have the District Court dismiss for want of jurisdiction. I respectfully dissent from the judgment of the Court.

Syllabus

CALCANO-MARTINEZ ET AL. *v.* IMMIGRATION AND NATURALIZATION SERVICE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 00–1011. Argued April 24, 2001—Decided June 25, 2001

Petitioners are lawful permanent United States residents subject to administratively final removal orders because they were convicted of aggravated felonies. Each filed a petition for review in the Second Circuit pursuant to 8 U. S. C. § 1252(a)(1) and a habeas corpus petition in the District Court pursuant to 28 U. S. C. § 2241 in order to challenge the Board of Immigration Appeals' determination that, as a matter of law, they were ineligible to apply for a discretionary waiver of deportation under former § 212(c) of the Immigration and Nationality Act. The Second Circuit dismissed their petitions for lack of jurisdiction, holding that they could nevertheless pursue their claims in a § 2241 action in district court.

Held: The Second Circuit lacked jurisdiction to hear the petitions for direct review, but petitioners can proceed with their habeas petitions if they wish to obtain relief. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 expressly precludes courts of appeals from exercising jurisdiction to review a final removal order against an alien removable by reason of a conviction for, *inter alia*, an aggravated felony. 8 U. S. C. § 1252(a)(2)(C). This plain language explicitly strips the courts of appeals of the ability to hear petitioners' claims on direct review. However, because Congress has not spoken with sufficient clarity to strip the district courts of jurisdiction to hear habeas petitions raising identical claims, see *INS* v. *St. Cyr*, *ante*, at 314, petitioners may pursue their claims in a § 2241 action. Pp. 350–352.

232 F. 3d 328, affirmed.

STEVENS, J., delivered the opinion of the Court, in which KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. O'CONNOR, J., filed a dissenting opinion, *post*, p. 352. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and THOMAS, J., joined, *post*, p. 352.

Lucas Guttentag argued the cause for petitioners. With him on the briefs were *Lee Gelernt*, *Steven R. Shapiro*, *Jayashri Srikantiah*, *Kerry W. Bretz*, *Jules E. Coven*, *Alan Michael Strauss*, and *Paul A. Engelmayer*.

Deputy Solicitor General Kneedler argued the cause for respondent. With him on the brief were *Acting Solicitor General Underwood, Acting Assistant Attorney General Schiffer, Paul R. Q. Wolfson, Donald E. Keener, William J. Howard, Ernesto H. Molina,* and *James A. O'Brien III.**

JUSTICE STEVENS delivered the opinion of the Court.

Deboris Calcano-Martinez, Sergio Madrid, and Fazila Khan are all lawful permanent residents of the United States subject to administratively final orders of removal. They conceded that they are deportable based upon their past criminal convictions, but each filed both a petition for review in the Second Circuit pursuant to 8 U. S. C. § 1252(a)(1) (1994 ed., Supp. V) and a habeas corpus petition in the District Court pursuant to 28 U. S. C. § 2241 in order to challenge the Board of Immigration Appeals' determination that, as a matter of law, petitioners were ineligible to apply for a discretionary waiver of deportation under former § 212(c) of the Immigration and Nationality Act, 66 Stat. 182, 8 U. S. C. § 1182(c) (1994 ed.). Their petitions for review were consolidated in the Court of Appeals, which subsequently dismissed the petitions for lack of jurisdiction, holding that petitioners could nevertheless pursue their constitutional and statutory claims in a district court habeas action brought pursuant to 28 U. S. C. § 2241. 232 F. 3d 328 (CA2 2000). We granted certiorari in this case, 531 U. S. 1108 (2001), and in *INS* v. *St. Cyr,* 531 U. S. 1107 (2001), in order to comprehensively consider whether aliens in the petitioners' position may seek relief in the Court of Appeals (pursuant to 8 U. S. C. § 1252(a)(1)); in the district court (pursuant to 28 U. S. C. § 2241); or not at all. For the reasons stated below and in our opinion in *INS* v. *St. Cyr, ante,* p. 289, we agree with the Court of Appeals that it lacks jurisdiction to hear

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**Martha W. Barnett, Jeffrey L. Bleich, Gerald Neuman,* and *Kelly M. Klaus* filed a brief for the American Bar Association as *amicus curiae.*

the petitions for direct review at issue in this case and that petitioners must, therefore, proceed with their petitions for habeas corpus if they wish to obtain relief.

As part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 110 Stat. 3009–546, Congress adopted new provisions governing the judicial review of immigration orders. See 8 U. S. C. § 1252 (1994 ed., Supp. V) (codifying these procedures). Like the prior statute, the new provision vests the courts of appeals with the authority to consider petitions challenging "final orders" commanding the "removal" of aliens from the United States. § 1252(a)(1).[1] However, unlike the previous provisions, the new statute expressly precludes the courts of appeals from exercising "jurisdiction to review any final order of removal against any alien who is removable by reason of" a conviction for certain criminal offenses, including any aggravated felony. § 1252(a)(2)(C).[2]

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[1] An additional difference between the old and the new statute with regard to petitions for review is one of nomenclature. In keeping with a statute-wide change in terminology, the new provision refers to orders of "removal" rather than orders of "deportation" or "exclusion." Compare 8 U. S. C. § 1252(a)(1) (1994 ed., Supp. V), with § 1105a (1994 ed.).

[2] The scope of this preclusion is not entirely clear. Though the text of the provision is quite broad, it is not without its ambiguities. Throughout this litigation, the Government has conceded that the courts of appeals have the power to hear petitions challenging the factual determinations thought to trigger the jurisdiction-stripping provision (such as whether an individual is an alien and whether he or she has been convicted of an "aggravated felony" within the meaning of the statute). See Brief for Respondent 22–23. In addition, the Government has also conceded that the courts of appeals retain jurisdiction to review "substantial constitutional challenges" raised by aliens who come within the strictures of § 1252(a)(2)(C). See *id.*, at 23–24. As the petitions in this case do not raise any of these types of issues, we need not address this point further. Nonetheless, it remains instructive that the Government acknowledges that background principles of statutory construction and constitutional concerns must be considered in determining the scope of IIRIRA's jurisdiction-stripping provisions.

As petitioners in this case were convicted of "aggravated felonies" within the meaning of the relevant statutes,[3] the plain language of § 1252(a)(2)(C) fairly explicitly strips the courts of appeals of jurisdiction to hear their claims on petitions for direct review. Without much discussion, the Court of Appeals so held. 232 F. 3d, at 342–343.

Before this Court, petitioners primarily argue that constitutional considerations and background principles of statutory interpretation require that they be afforded some forum for the adjudication of the merits of their claims. They devote the bulk of their briefs to arguing that the Court of Appeals—motivated by these concerns—properly interpreted IIRIRA's jurisdiction-stripping provision not to preclude aliens such as petitioners from pursuing habeas relief pursuant to 28 U. S. C. § 2241. Brief for Petitioners 12–42, 44–49. In the alternative, they argue that we might construe the same provisions as stripping jurisdiction from the courts of appeals over only some matters, leaving in place their jurisdiction to directly review petitions raising claims previously cognizable under § 2241. *Id.*, at 42–44.

We agree with petitioners that leaving aliens without a forum for adjudicating claims such as those raised in this case would raise serious constitutional questions. We also agree with petitioners—and the Court of Appeals—that these concerns can best be alleviated by construing the jurisdiction-stripping provisions of that statute not to preclude aliens such as petitioners from pursuing habeas relief pursuant to § 2241. See *St. Cyr, ante*, at 314.

Finding no support in the text or history of § 1252 for concluding that the courts of appeals retain jurisdiction to hear petitions such as those brought in this case, but concluding

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[3] All three petitioners were convicted of controlled substance offenses for which they served between four months and four years in prison. Each concedes that his or her crime is an "aggravated felony" as defined in 8 U. S. C. § 1101(a)(43), which renders him or her removable pursuant to § 1227(a)(2)(A)(iii).

that Congress has not spoken with sufficient clarity to strip the district courts of jurisdiction to hear habeas petitions raising identical claims, we affirm the judgment of the Court of Appeals in all particulars.

It is so ordered.

JUSTICE O'CONNOR, dissenting.

For the reasons stated in my dissenting opinion in the companion case of *INS* v. *St. Cyr*, *ante*, p. 326, I agree with JUSTICE SCALIA's proposed disposition of the instant case.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

For the reasons stated in my dissenting opinion in the companion case of *INS* v. *St. Cyr*, *ante*, p. 326, I would vacate the judgment of the court below and remand with instructions to dismiss for want of jurisdiction, with prejudice to petitioners Calcano-Martinez's and Madrid's refiling in the District Court.

Syllabus

NEVADA ET AL. *v.* HICKS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 99–1994. Argued March 21, 2001—Decided June 25, 2001

Respondent Hicks is a member of the Fallon Paiute-Shoshone Tribes of western Nevada and lives on the Tribes' reservation. After petitioner state game wardens executed state-court and tribal-court search warrants to search Hicks's home for evidence of an off-reservation crime, he filed suit in the Tribal Court against, *inter alios*, the wardens in their individual capacities and petitioner Nevada, alleging trespass, abuse of process, and violation of constitutional rights remediable under 42 U. S. C. § 1983. The Tribal Court held that it had jurisdiction over the tribal tort and federal civil rights claims, and the Tribal Appeals Court affirmed. Petitioners then sought, in Federal District Court, a declaratory judgment that the Tribal Court lacked jurisdiction over the claims. The District Court granted respondents summary judgment on that issue and held that the wardens would have to exhaust their qualified immunity claims in the Tribal Court. In affirming, the Ninth Circuit concluded that the fact that Hicks's home is on tribe-owned reservation land is sufficient to support tribal jurisdiction over civil claims against nonmembers arising from their activities on that land.

Held:

1. The Tribal Court did not have jurisdiction to adjudicate the wardens' alleged tortious conduct in executing a search warrant for an off-reservation crime. Pp. 357–366.

(a) As to nonmembers, a tribal court's inherent adjudicatory authority is at most as broad as the tribe's regulatory authority. *Strate* v. *A–1 Contractors*, 520 U. S. 438, 453. Pp. 357–358.

(b) The rule that, where nonmembers are concerned, "the exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations . . . cannot survive without express congressional delegation," *Montana* v. *United States*, 450 U. S. 544, 564, applies to both Indian and non-Indian land. The land's ownership status is only one factor to be considered, and while that factor may sometimes be dispositive, tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers. Pp. 358–360.

(c) Tribal authority to regulate state officers in executing process related to the off-reservation violation of state laws is not essential to tribal self-government or internal relations. The State's interest in

executing process is considerable, and it no more impairs the Tribes' self-government than federal enforcement of federal law impairs state government. The State's interest is not diminished because this suit is against officials in their individual capacities. Pp. 360–365.

(d) Congress has not stripped the States of their inherent jurisdiction on reservations with regard to off-reservation violations of state law. The federal statutory scheme neither prescribes nor suggests that state officers cannot enter a reservation to investigate or prosecute such violations. Pp. 365–366.

2. The Tribal Court had no jurisdiction over the § 1983 claims. Tribal courts are not courts of "general jurisdiction." The historical and constitutional assumption of concurrent state-court jurisdiction over cases involving federal statutes is missing with respect to tribal courts, and their inherent adjudicative jurisdiction over nonmembers is at most only as broad as their legislative jurisdiction. Congress has not purported to grant tribal courts jurisdiction over § 1983 claims, and such jurisdiction would create serious anomalies under 28 U. S. C. § 1441. Pp. 366–369.

3. Petitioners were not required to exhaust their claims in the Tribal Court before bringing them in the Federal District Court. Because the rule that tribal courts lack jurisdiction over state officials for causes of action relating to their performance of official duties is clear, adherence to the tribal exhaustion requirement would serve no purpose other than delay and is therefore unnecessary. P. 369.

4. Various arguments to the contrary lack merit. Pp. 370–375.

196 F. 3d 1020, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and KENNEDY, SOUTER, THOMAS, and GINSBURG, JJ., joined. SOUTER, J., filed a concurring opinion, in which KENNEDY and THOMAS, JJ., joined, *post*, p. 375. GINSBURG, J., filed a concurring opinion, *post*, p. 386. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, in which STEVENS and BREYER, JJ., joined, *post*, p. 387. STEVENS, J., filed an opinion concurring in the judgment, in which BREYER, J., joined, *post*, p. 401.

C. Wayne Howle, Senior Deputy Attorney General of Nevada, argued the cause for petitioners. With him on the briefs were *Frankie Sue Del Papa*, Attorney General, *Paul G. Taggart*, Deputy Attorney General, and *Jeffrey S. Sutton*.

S. James Anaya argued the cause for respondents and filed a brief for respondent Hicks. *Kim Jerome Gottschalk*

and *Melody McCoy* filed a brief for respondents Tribal Court in and for the Fallon Paiute-Shoshone Tribes et al.

Barbara McDowell argued the cause for the United States as *amicus curiae* urging affirmance. With her on the brief were former *Solicitor General Waxman, Assistant Attorney General Schiffer, Deputy Solicitor General Kneedler, David C. Shilton,* and *William B. Lazarus.**

JUSTICE SCALIA delivered the opinion of the Court.

This case presents the question whether a tribal court may assert jurisdiction over civil claims against state officials who entered tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation.

I

Respondent Hicks[1] is one of about 900 members of the Fallon Paiute-Shoshone Tribes of western Nevada. He re-

*A brief of *amici curiae* urging reversal was filed for the State of Montana et al. by *Joseph P. Mazurek,* Attorney General of Montana, *Clay R. Smith,* Solicitor, and *Harley R. Harris,* Assistant Attorney General, joined by the Attorneys General for their respective States as follows: *Bill Pryor* of Alabama, *Janet Napolitano* of Arizona, *Richard Blumenthal* of Connecticut, *Robert A. Butterworth* of Florida, *Carla J. Stovall* of Kansas, *Jennifer M. Granholm* of Michigan, *Mike Moore* of Mississippi, *Heidi Heitkamp* of North Dakota, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Sheldon Whitehouse* of Rhode Island, *Charles M. Condon* of South Carolina, *Mark Barnett* of South Dakota, *John Cornyn* of Texas, *Jan Graham* of Utah, *James E. Doyle* of Wisconsin, and *Gay Woodhouse* of Wyoming.

Briefs of *amici curiae* urging affirmance were filed for the Coalition for Local Sovereignty by *Kenneth B. Clark;* for the Confederated Tribes of the Colville Reservation et al. by *William R. Perry;* for the Pyramid Lake Paiute Tribe of Nevada et al. by *John Fredericks III;* and for the Thlopthlocco Tribal Town et al. by *D. Michael McBride III* and *Steven K. Balman.*

[1] Hereinafter, Hicks will be referred to as "respondent." The Tribal Court and Judge are also respondents, however, and are included when the term "respondents" is used.

sides on the Tribes' reservation of approximately 8,000 acres, established by federal statute in 1908, ch. 53, 35 Stat. 85. In 1990 Hicks came under suspicion of having killed, off the reservation, a California bighorn sheep, a gross misdemeanor under Nevada law, see Nev. Rev. Stat. § 501.376 (1999). A state game warden obtained from state court a search warrant "SUBJECT TO OBTAINING APPROVAL FROM THE FALLON TRIBAL COURT IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES." According to the issuing judge, this tribal-court authorization was necessary because "[t]his Court has no jurisdiction on the Fallon Paiute-Shoshone Indian Reservation." App. G to Pet. for Cert. 1. A search warrant was obtained from the tribal court, and the warden, accompanied by a tribal police officer, searched respondent's yard, uncovering only the head of a Rocky Mountain bighorn, a different (and unprotected) species of sheep.

Approximately one year later, a tribal police officer reported to the warden that he had observed two mounted bighorn sheep heads in respondent's home. The warden again obtained a search warrant from state court; though this warrant did not explicitly require permission from the Tribes, see App. F to Pet. for Cert. 2, a tribal-court warrant was nonetheless secured, and respondent's home was again (unsuccessfully) searched by three wardens and additional tribal officers.

Respondent, claiming that his sheep heads had been damaged, and that the second search exceeded the bounds of the warrant, brought suit against the Tribal Judge, the tribal officers, the state wardens in their individual and official capacities, and the State of Nevada in the Tribal Court in and for the Fallon Paiute-Shoshone Tribes. (His claims against all defendants except the state wardens and the State of Nevada were dismissed by directed verdict and are not at issue here.) Respondent's causes of action included trespass to land and chattels, abuse of process, and violation of civil

rights—specifically, denial of equal protection, denial of due process, and unreasonable search and seizure, each remediable under Rev. Stat. § 1979, 42 U. S. C. § 1983. See App. 8–21, 25–29. Respondent later voluntarily dismissed his case against the State and against the state officials in their official capacities, leaving only his suit against those officials in their individual capacities. See *id.*, at 32–35.

The Tribal Court held that it had jurisdiction over the claims, a holding affirmed by the Tribal Appeals Court. The state officials and Nevada then filed an action in Federal District Court seeking a declaratory judgment that the Tribal Court lacked jurisdiction. The District Court granted summary judgment to respondent on the issue of jurisdiction, and also held that the state officials would have to exhaust any claims of qualified immunity in the tribal court. The Ninth Circuit affirmed, concluding that the fact that respondent's home is located on tribe-owned land within the reservation is sufficient to support tribal jurisdiction over civil claims against nonmembers arising from their activities on that land. 196 F. 3d 1020 (1999). We granted certiorari, 531 U. S. 923 (2000).

II

In this case, which involves claims brought under both tribal and federal law, it is necessary to determine, as to the former, whether the Tribal Court in and for the Fallon Paiute-Shoshone Tribes has jurisdiction to adjudicate the alleged tortious conduct of state wardens executing a search warrant for evidence of an off-reservation crime; and, as to the latter, whether the Tribal Court has jurisdiction over claims brought under 42 U. S. C. § 1983. We address the former question first.

A

The principle of Indian law central to this aspect of the case is our holding in *Strate* v. *A–1 Contractors*, 520 U. S. 438, 453 (1997): "As to nonmembers . . . a tribe's adjudicative

jurisdiction does not exceed its legislative jurisdiction . . . ." That formulation leaves open the question whether a tribe's adjudicative jurisdiction over nonmember defendants *equals* its legislative jurisdiction.[2] We will not have to answer that open question if we determine that the Tribes in any event lack legislative jurisdiction in this case. We first inquire, therefore, whether the Fallon Paiute-Shoshone Tribes—either as an exercise of their inherent sovereignty, or under grant of federal authority—can regulate state wardens executing a search warrant for evidence of an off-reservation crime.

Indian tribes' regulatory authority over nonmembers is governed by the principles set forth in *Montana* v. *United States*, 450 U. S. 544 (1981), which we have called the "path-marking case" on the subject, *Strate*, *supra*, at 445. In deciding whether the Crow Tribe could regulate hunting and fishing by nonmembers on land held in fee simple by nonmembers, *Montana* observed that, under our decision in *Oliphant* v. *Suquamish Tribe*, 435 U. S. 191 (1978), tribes lack criminal jurisdiction over nonmembers. Although, it continued, "*Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign

[2] In *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U. S. 845, 855–856 (1985), we avoided the question whether tribes may generally adjudicate against nonmembers claims arising from on-reservation transactions, and we have never held that a tribal court had jurisdiction over a nonmember defendant. Typically, our cases have involved claims brought against tribal defendants. See, *e. g.*, *Williams* v. *Lee*, 358 U. S. 217 (1959). In *Strate* v. *A–1 Contractors*, 520 U. S. 438, 453 (1997), however, we assumed that "where tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumably lies in the tribal courts," without distinguishing between nonmember plaintiffs and nonmember defendants. See also *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U. S. 9, 18 (1987). Our holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law. We leave open the question of tribal-court jurisdiction over nonmember defendants in general.

powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." 450 U. S., at 565 (footnote omitted). Where nonmembers are concerned, the "exercise of tribal power *beyond what is necessary to protect tribal self-government or to control internal relations* is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Id.*, at 564 (emphasis added).[3]

Both *Montana* and *Strate* rejected tribal authority to regulate nonmembers' activities on land over which the tribe could not "assert a landowner's right to occupy and exclude," *Strate, supra,* at 456; *Montana, supra,* at 557, 564. Respondents and the United States argue that since Hicks's home and yard *are* on tribe-owned land within the reservation, the Tribe may make its exercise of regulatory authority over nonmembers a condition of nonmembers' entry. Not necessarily. While it is certainly true that the non-Indian ownership status of the land was central to the analysis in both *Montana* and *Strate,* the reason that was so was *not* that Indian ownership suspends the "general proposition" derived from *Oliphant* that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe" except to the extent "necessary to protect tribal self-government or to control internal relations." 450 U. S., at 564–565. *Oliphant* itself drew no distinctions based on the status of land. And *Montana,* after announcing the general rule of no jurisdiction over non-

[3] *Montana* recognized an exception to this rule for tribal regulation of "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U. S., at 565. Though the wardens in this case "consensually" obtained a warrant from the Tribal Court before searching respondent's home and yard, we do not think this qualifies as an "other arrangement" within the meaning of this passage. Read in context, an "other arrangement" is clearly another *private consensual* relationship, from which the official actions at issue in this case are far removed.

members, cautioned that "[t]o be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands," 450 U. S., at 565—clearly implying that the general rule of *Montana* applies to both Indian and non-Indian land. The ownership status of land, in other words, is only one factor to consider in determining whether regulation of the activities of nonmembers is "necessary to protect tribal self-government or to control internal relations." It may sometimes be a dispositive factor. Hitherto, the absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction; with one minor exception, we have never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land. Compare, *e. g.*, *Merrion* v. *Jicarilla Apache Tribe*, 455 U. S. 130, 137, 142 (1982) (tribe has taxing authority over tribal lands leased by nonmembers), with *Atkinson Trading Co.* v. *Shirley*, 532 U. S. 645, 659 (2001) (tribe has no taxing authority over nonmembers' activities on land held by nonmembers in fee); but see *Brendale* v. *Confederated Tribes and Bands of Yakima Nation*, 492 U. S. 408, 443–444, 458–459 (1989) (opinions of STEVENS, J., and Blackmun, J.) (tribe can impose zoning regulation on that 3.1% of land within reservation area closed to public entry that was not owned by the tribe). But the existence of tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers.

We proceed to consider, successively, the following questions: whether regulatory jurisdiction over state officers in the present context is "necessary to protect tribal self-government or to control internal relations," and, if not, whether such regulatory jurisdiction has been congressionally conferred.

B

In *Strate*, we explained that what is necessary to protect tribal self-government and control internal relations can be understood by looking at the examples of tribal power to

which *Montana* referred: tribes have authority "[to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members," 520 U. S., at 459 (brackets in original), quoting *Montana, supra,* at 564. These examples show, we said, that Indians have "'the right . . . to make their own laws and be ruled by them,'" 520 U. S., at 459, quoting *Williams* v. *Lee,* 358 U. S. 217, 220 (1959). See also *Fisher* v. *District Court of Sixteenth Judicial Dist. of Mont.,* 424 U. S. 382, 386 (1976) *(per curiam)* ("In litigation between Indians and non-Indians arising out of conduct on an Indian reservation, resolution of conflicts between the jurisdiction of state and tribal courts has depended, absent a governing Act of Congress, on whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them" (internal quotation marks and citation omitted)). Tribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them. See *Merrion, supra,* at 137, 142 ("The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government," at least as to "tribal lands" on which the tribe "has . . . authority over a nonmember").

Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border. Though tribes are often referred to as "sovereign" entities, it was "long ago" that "the Court departed from Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries. *Worcester* v. *Georgia,* 6 Pet. 515, 561 (1832)," *White Mountain Apache Tribe* v. *Bracker,* 448 U. S. 136, 141 (1980).[4] "Ordinarily," it is now clear, "an Indian

[4] Our holding in *Worcester* must be considered in light of the fact that "[t]he 1828 treaty with the Cherokee Nation . . . guaranteed the Indians their lands would never be subjected to the jurisdiction of any State or

reservation is considered part of the territory of the State." U. S. Dept. of Interior, Federal Indian Law 510, and n. 1 (1958), citing *Utah & Northern R. Co.* v. *Fisher*, 116 U. S. 28 (1885); see also *Organized Village of Kake* v. *Egan*, 369 U. S. 60, 72 (1962).

That is not to say that States may exert the same degree of regulatory authority within a reservation as they do without. To the contrary, the principle that Indians have the right to make their own laws and be governed by them requires "an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other." *Washington* v. *Confederated Tribes of Colville Reservation*, 447 U. S. 134, 156 (1980); see also *id.*, at 181 (opinion of REHNQUIST, J.). "When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." *Bracker*, *supra*, at 144. When, however, state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land, as exemplified by our decision in *Confederated Tribes*. In that case, Indians were selling cigarettes on their reservation to nonmembers from off reservation, without collecting the state cigarette tax. We held that the State could require the Tribes to collect the tax from nonmembers, and could "impose at least 'minimal' burdens on the Indian retailer to aid in enforcing and collecting the tax," 447 U. S., at 151. It is also well established in our precedent that States have criminal jurisdiction over reservation Indians for crimes committed (as was the alleged poaching in this case) off the reservation. See *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 148–149 (1973).

Territory." *Organized Village of Kake* v. *Egan*, 369 U. S. 60, 71 (1962); cf. *Williams* v. *Lee*, 358 U. S., at 221–222 (comparing Navajo treaty to the Cherokee treaty in *Worcester*).

While it is not entirely clear from our precedent whether the last mentioned authority entails the corollary right to enter a reservation (including Indian-fee lands) for enforcement purposes, several of our opinions point in that direction. In *Confederated Tribes*, we explicitly reserved the question whether state officials could seize cigarettes held for sale to nonmembers in order to recover the taxes due. See 447 U. S., at 162. In *Utah & Northern R. Co.*, however, we observed that "[i]t has . . . been held that process of [state] courts may run into an Indian reservation of this kind, where the subject-matter or controversy is otherwise within their cognizance," 116 U. S., at 31.[5] Shortly thereafter, we considered, in *United States* v. *Kagama*, 118 U. S. 375 (1886), whether Congress could enact a law giving federal courts jurisdiction over various common-law, violent crimes committed by Indians on a reservation within a State. We expressed skepticism that the Indian Commerce Clause could justify this assertion of authority in derogation of state jurisdiction, but ultimately accepted the argument that the law

> "does not interfere with the process of the State courts within the reservation, nor with the operation of State laws upon white people found there. Its effect is confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation.
>
> "It seems to us that this is within the competency of Congress." *Id.*, at 383.

The Court's references to "process" in *Utah & Northern R. Co.* and *Kagama*, and the Court's concern in *Kagama* over possible federal encroachment on state prerogatives, sug-

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[5] Though *Utah & Northern R. Co.* did not state what it meant by a "reservation of this kind," the context makes clear that it meant a reservation not excluded from the territory of a State by treaty. See, *e. g.*, *Harkness* v. *Hyde*, 98 U. S. 476, 478 (1879); *The Kansas Indians*, 5 Wall. 737, 739–741 (1867).

gest state authority to issue search warrants in cases such as the one before us. ("Process" is defined as "any means used by a court to acquire or exercise its jurisdiction over a person or over specific property," Black's Law Dictionary 1084 (5th ed. 1979), and is equated in criminal cases with a warrant, *id.*, at 1085.) It is noteworthy that *Kagama* recognized the right of state *laws* to "operat[e] . . . upon [non-Indians] found" within a reservation, but did not similarly limit to non-Indians or the property of non-Indians the scope of the *process* of state courts. This makes perfect sense, since, as we explained in the context of federal enclaves, the reservation of state authority to serve process is necessary to "prevent [such areas] from becoming an asylum for fugitives from justice." *Fort Leavenworth R. Co.* v. *Lowe*, 114 U. S. 525, 533 (1885).[6]

We conclude today, in accordance with these prior statements, that tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations—to "the right to make laws and be ruled by them." The State's interest in execution of process is considerable, and even when it relates to Indian-fee lands it no more impairs the tribe's self-government than federal enforcement of federal law impairs state government. Respondents argue that, even conceding the State's general interest in enforcing its off-reservation poaching law on the reservation, Nevada's interest in *this suit* is minimal, because it is a suit against state officials in their *individual*

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[6] That this risk is not purely hypothetical is demonstrated by *Arizona ex rel. Merrill* v. *Turtle*, 413 F. 2d 683 (CA9 1969), a case in which the Navajo Tribal Court refused to extradite a member to Oklahoma because tribal law forbade extradition except to three neighboring States. The Ninth Circuit held that Arizona (where the reservation was located) could not enter the reservation to seize the suspect for extradition since (among other reasons) this would interfere with tribal self-government, *id.*, at 685–686.

capacities. We think, however, that the distinction between individual and official capacity suits is irrelevant. To paraphrase our opinion in *Tennessee* v. *Davis*, 100 U. S. 257, 263 (1880), which upheld a federal statute permitting federal officers to remove to federal court state criminal proceedings brought against them for their official actions, a State "can act only through its officers and agents," and if a tribe can "affix penalties to acts done under the immediate direction of the [state] government, and in obedience to its laws," "the operations of the [state] government may at any time be arrested at the will of the [tribe]." Cf. *Anderson* v. *Creighton*, 483 U. S. 635, 638 (1987) ("[P]ermitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties").

C

The States' inherent jurisdiction on reservations can of course be stripped by Congress, see *Draper* v. *United States*, 164 U. S. 240, 242–243 (1896). But with regard to the jurisdiction at issue here that has not occurred. The Government's assertion that "[a]s a general matter, although state officials have jurisdiction to investigate and prosecute crimes on a reservation that exclusively involve non-Indians, . . . they do not have jurisdiction with respect to crimes involving Indian perpetrators or Indian victims," Brief for United States as *Amicus Curiae* 12–13, n. 7, is misleading. The statutes upon which it relies, see *id.*, at 18–19, show that the last half of the statement, like the first, is limited to "crimes *on a reservation.*" Sections 1152 and 1153 of Title 18, which give United States and tribal criminal law generally exclusive application, apply only to crimes committed *in Indian country;* Public Law 280, codified at 18 U. S. C. § 1162, which permits some state jurisdiction as an exception to this rule, is similarly limited. And 25 U. S. C.

§ 2804, which permits federal-state agreements enabling state law enforcement agents to act on reservations, applies only to deputizing them for the enforcement of federal or tribal criminal law. Nothing in the federal statutory scheme prescribes, or even remotely suggests, that state officers cannot enter a reservation (including Indian-fee land) to investigate or prosecute violations of state law occurring off the reservation. To the contrary, 25 U. S. C. § 2806 affirms that "the provisions of this chapter alter neither . . . the law enforcement, investigative, or judicial authority of any . . . State, or political subdivision or agency thereof . . . ."

III

We turn next to the contention of respondent and the Government that the tribal court, as a court of general jurisdiction, has authority to entertain federal claims under § 1983.[7] It is certainly true that state courts of "general jurisdiction" can adjudicate cases invoking federal statutes, such as § 1983, absent congressional specification to the contrary. "Under [our] system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States," *Tafflin* v. *Levitt*, 493 U. S. 455, 458 (1990). That this would be the case was assumed by the Framers, see The Federalist No. 82, pp. 492–493 (C. Rossiter ed. 1961). Indeed, that state courts could enforce federal law is presumed by Article III of the

[7] JUSTICE STEVENS questions why it is necessary to consider tribal-court jurisdiction over § 1983 claims, since we have already determined that "tribal courts lack . . . jurisdiction over 'state wardens executing a search warrant for evidence of an off-reservation crime,'" *post*, at 402, n. 1 (opinion concurring in judgment). It is because the latter determination is based upon *Strate*'s holding that tribal-court jurisdiction does not exceed tribal regulatory jurisdiction; and because that holding contained a significant qualifier: "[a]bsent congressional direction enlarging tribal-court jurisdiction," 520 U. S., at 453. We conclude (as we must) that § 1983 is not such an enlargement.

Constitution, which leaves to Congress the decision whether to create lower federal courts at all. This historical and constitutional assumption of concurrent state-court jurisdiction over federal-law cases is completely missing with respect to tribal courts.

Respondents' contention that tribal courts are courts of "general jurisdiction" is also quite wrong. A state court's jurisdiction is general, in that it "lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe." *Id.*, at 493. Tribal courts, it should be clear, cannot be courts of general jurisdiction in this sense, for a tribe's inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction. See *supra*, at 357–359.[8] It is true that some statutes proclaim tribal-court jurisdiction over certain questions of federal law. See, *e. g.*, 25 U. S. C. § 1911(a) (authority to adjudicate child custody disputes under the Indian Child Welfare Act of 1978); 12 U. S. C. § 1715z–13(g)(5) (jurisdiction over mortgage foreclosure actions brought by the Secretary of Housing and Urban Development against reserva-

[8] JUSTICE STEVENS argues that "[a]bsent federal law to the contrary, the question whether tribal courts are courts of general jurisdiction is fundamentally one of tribal law." *Post*, at 402 (emphasis deleted). The point of our earlier discussion is that *Strate* is "federal law to the contrary." JUSTICE STEVENS thinks *Strate* cannot fill that role, because it "merely concerned the circumstances under which tribal courts can exert jurisdiction over claims against nonmembers," *post*, at 403, n. 3. But *Strate*'s limitation on jurisdiction over nonmembers pertains to subject-matter, rather than merely personal, jurisdiction, since it turns upon whether the actions at issue in the litigation are regulable by the tribe. One can of course say that even courts of limited subject-matter jurisdiction have general jurisdiction over those subjects that they *can* adjudicate (in the present case, jurisdiction over claims pertaining to activities by nonmembers that can be regulated)—but that makes the concept of general jurisdiction meaningless, and is assuredly not the criterion that would determine whether these courts received authority to adjudicate § 1983 actions.

tion homeowners). But no provision in federal law provides for tribal-court jurisdiction over § 1983 actions.

Furthermore, tribal-court jurisdiction would create serious anomalies, as the Government recognizes, because the general federal-question removal statute refers only to removal from *state* court, see 28 U. S. C. § 1441. Were § 1983 claims cognizable in tribal court, defendants would inexplicably lack the right available to state-court § 1983 defendants to seek a federal forum. The Government thinks the omission of reference to tribal courts in § 1441 unproblematic. Since, it argues, "[i]t is doubtful . . . that Congress intended to deny tribal court defendants the right given state court defendants to elect a federal forum for the adjudication of causes of action under federal law," we should feel free to create that right by permitting the tribal-court defendant to obtain a federal-court injunction against the action, effectively forcing it to be refiled in federal court. Brief for United States as *Amicus Curiae* 25–26. The sole support for devising this extraordinary remedy is *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U. S. 473 (1999), where we approved a similar procedure with regard to claims under the Price-Anderson Act brought in tribal court. In *Neztsosie*, however, the claims were not initially federal claims, but Navajo tort claims that the Price-Anderson Act provided "shall be deemed to be . . . action[s] arising under" 42 U. S. C. § 2210; there was little doubt that the tribal court had jurisdiction over such tort claims, see 526 U. S., at 482, n. 4. And for the propriety of the injunction in *Neztsosie*, we relied not on § 1441, but on the removal provision of the Price-Anderson Act, 42 U. S. C. § 2210(n)(2). Although, like § 1441, that provision referred only to removal from state courts, in light of the Act's detailed and distinctive provisions for the handling of "nuclear incident" cases in federal court, see 526 U. S., at 486, we thought it clear Congress envisioned the defendant's ability to get into federal court in all in-

stances. Not only are there missing here any distinctive federal-court procedures, but in order even to *confront* the question whether an unspecified removal power exists, we must first attribute to tribal courts jurisdiction that is not apparent. Surely the simpler way to avoid the removal problem is to conclude (as other indications suggest anyway) that tribal courts cannot entertain § 1983 suits.

IV

The last question before us is whether petitioners were required to exhaust their jurisdictional claims in Tribal Court before bringing them in Federal District Court. See *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U. S. 845, 856–857 (1985). In *National Farmers Union* we recognized exceptions to the exhaustion requirement, where "an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, . . . or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction," *id.*, at 856, n. 21 (internal quotation marks omitted). None of these exceptions seems applicable to this case, but we added a broader exception in *Strate:* "[w]hen . . . it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule," so the exhaustion requirement "would serve no purpose other than delay." 520 U. S., at 459–460, and n. 14. Though this exception too is technically inapplicable, the reasoning behind it is not. Since it is clear, as we have discussed, that tribal courts lack jurisdiction over state officials for causes of action relating to their performance of official duties, adherence to the tribal exhaustion requirement in such cases "would serve no purpose other than delay," and is therefore unnecessary.

V

Finally, a few words in response to the concurrence of JUSTICE O'CONNOR, which is in large part a dissent from the views expressed in this opinion.[9]

The principal point of the concurrence is that our reasoning "gives only passing consideration to the fact that the state officials' activities in this case occurred on land owned and controlled by the Tribes," *post*, at 392. According to JUSTICE O'CONNOR, "that factor is not prominent in the Court's analysis," *post*, at 395. Even a cursory reading of our opinion demonstrates that this is not so. To the contrary, we acknowledge that tribal ownership is a factor in the *Montana* analysis, and a factor significant enough that it "may sometimes be . . . dispositive," *supra*, at 360. We simply do not find it dispositive in the present case, when weighed against the State's interest in pursuing off-reservation violations of its laws. See *supra*, at 364 (concluding that "[t]he State's interest in execution of process is considerable" enough to outweigh the tribal interest in self-government "even when it relates to Indian-fee lands"). The concurrence is of course free to disagree with this judgment; but to say that failure to give tribal ownership deter-

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[9] JUSTICE O'CONNOR claims we have gone beyond the scope of the questions presented in this case by determining whether the Tribes could *regulate* the state game warden's actions on tribal land, because this is a case about tribal "civil *adjudicatory* jurisdiction." See *post*, at 397 (opinion concurring in part and concurring in judgment). But the third question presented, see Pet. for Writ of Cert. i, is as follows: "Is the rule of *[Montana]*, creating a presumption against tribal court jurisdiction over nonmembers, limited to cases in which a cause of action against a nonmember arises on lands within a reservation which are not controlled by the tribe?" *Montana* dealt only with regulatory authority, and is tied to adjudicatory authority by *Strate*, which held that the latter at best *tracks* the former. As is made clear in the merits briefing, petitioners' argument is that the Tribes lacked adjudicatory authority *because* they lacked regulatory authority over the game wardens. See Brief for Petitioners 36–44.

minative effect "fails to consider adequately the Tribe's inherent sovereign interests in activities on their land," *post*, at 401 (opinion of O'CONNOR, J.), is an exaggeration.

The concurrence marshals no authority and scant reasoning to support its judgment that tribal authority over state officers pursuing, on tribe-owned land, off-reservation violations of state law may be "necessary to protect tribal self-government or to control internal relations." *Montana*, 450 U. S., at 564–565. *Self*-government and *internal* relations are not directly at issue here, since the issue is whether the Tribes' law will apply, not to their own members, but to a narrow category of outsiders. And the concurrence does not try to explain how allowing state officers to pursue off-reservation violation of state law "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," *id.*, at 566. That the actions of these state officers cannot threaten or affect those interests is guaranteed by the limitations of federal constitutional and statutory law to which the officers are fully subject.

The concurrence exaggerates and distorts the consequences of our conclusion, *supra*, at 359, n. 3, that the term "other arrangements" in a passage from *Montana* referred to other "*private consensual*" arrangements—so that it did not include the state officials' obtaining of tribal warrants in the present case. That conclusion is correct, as a fuller exposition of the passage from *Montana* makes clear:

> "To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U. S., at 565.

The Court (this is an opinion, bear in mind, not a statute) obviously did not have in mind States or state officers acting in their governmental capacity; it was referring to private individuals who voluntarily submitted themselves to tribal regulatory jurisdiction by the arrangements that they (or their employers) entered into. This is confirmed by the fact that all four of the cases in the immediately following citation involved private commercial actors. See *Confederated Tribes*, 447 U. S., at 152 (nonmember purchasers of cigarettes from tribal outlet); *Williams* v. *Lee*, 358 U. S., at 217 (general store on the Navajo reservation); *Morris* v. *Hitchcock*, 194 U. S. 384 (1904) (ranchers grazing livestock and horses on Indian lands "under contracts with individual members of said tribes"); *Buster* v. *Wright*, 135 F. 947, 950 (CA8 1905) (challenge to the "permit tax" charged by a tribe to nonmembers for "the privilege . . . of trading within the borders").

The concurrence concludes from this brief footnote discussion that we would invalidate express or implied cessions of regulatory authority over nonmembers contained in state-tribal cooperative agreements, including those pertaining to mutual law enforcement assistance, tax administration assistance, and child support and paternity matters. See *post*, at 393–394. This is a great overreaching. The footnote does not assert that "a consensual relationship [between a tribe and a State] could never exist," *post*, at 394 (opinion of O'CONNOR, J.). It merely asserts that "other arrangements" in the passage from *Montana* does not include state officers' obtaining of an (unnecessary) tribal warrant. Whether contractual relations between State and tribe can expressly or impliedly confer tribal regulatory jurisdiction over nonmembers—and whether such conferral can be effective to confer adjudicative jurisdiction as well—are questions that may arise in another case, but are not at issue here.

Another exaggeration is the concurrence's contention that we "give nonmembers freedom to act with impunity on tribal

land based solely on their status as state law enforcement officials," *post*, at 401 (opinion of O'CONNOR, J.). We do not say state officers cannot be regulated; we say they cannot be regulated in the performance of their law enforcement duties. Action unrelated to that is potentially subject to tribal control depending on the outcome of *Montana* analysis. Moreover, even where the issue is whether the officer has acted unlawfully in the performance of his duties, the tribe and tribe members are of course able to invoke the authority of the Federal Government and federal courts (or the state government and state courts) to vindicate constitutional or other federal- and state-law rights.

We must comment upon the final paragraphs of Part II of the concurrence's opinion—which bring on stage, in classic fashion, a *deus ex machina* to extract, from the seemingly insoluble difficulties that the prior writing has created, a happy ending. The concurrence manages to have its cake and eat it too—to hand over state law enforcement officers to the jurisdiction of tribal courts and yet still assure that the officers' traditional immunity (and hence the State's law enforcement interest) will be protected—by simply announcing "that in order to protect government officials, immunity claims should be considered in reviewing tribal court jurisdiction." *Post*, at 401 (opinion of O'CONNOR, J.). What wonderful magic. Without so much as a citation (none is available) the concurrence declares the qualified immunity inquiry to be part of the jurisdictional inquiry, thus bringing it within the ken of the federal court at the outset of the case. There are two problems with this declaration. The first is that it is not true. There is no authority whatever for the proposition that absolute- and qualified-immunity defenses pertain to the court's jurisdiction—much less to the tribe's *regulatory* jurisdiction, which is what is at issue here. (If they did pertain to the court's jurisdiction, they would presumably be nonwaivable. Cf. *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U. S. 261, 267 (1997).) And the second

problem is that without *first* determining whether the tribe has regulatory jurisdiction, it is impossible to know which "immunity defenses" the federal court is supposed to consider. The tribe's law on this subject need not be the same as the State's; indeed, the tribe may decide (as did the common law until relatively recently) that there is no immunity defense whatever without a warrant. See *California* v. *Acevedo*, 500 U. S. 565, 581 (1991) (SCALIA, J., concurring in judgment). One wonders whether, deprived of its *deus ex machina*, the concurrence would not alter the conclusion it reached in Part I of its opinion, and agree with us that a proper balancing of state and tribal interests would give the Tribes no jurisdiction over state officers pursuing off-reservation violations of state law.

Finally, it is worth observing that the concurrence's resolution would, for the first time, hold a non-Indian subject to the jurisdiction of a tribal court. The question (which we have avoided) whether tribal regulatory and adjudicatory jurisdiction are coextensive is simply answered by the concurrence in the affirmative. As JUSTICE SOUTER's separate opinion demonstrates, it surely deserves more considered analysis.

* * *

Because the Fallon Paiute-Shoshone Tribes lacked legislative authority to restrict, condition, or otherwise regulate the ability of state officials to investigate off-reservation violations of state law, they also lacked adjudicative authority to hear respondent's claim that those officials violated tribal law in the performance of their duties. Nor can the Tribes identify any authority to adjudicate respondent's § 1983 claim. And since the lack of authority is clear, there is no need to exhaust the jurisdictional dispute in tribal court. State officials operating on a reservation to investigate off-reservation violations of state law are properly held accountable for tortious conduct and civil rights violations in either state or federal court, but not in tribal court.

The judgment of the Court of Appeals is reversed, and the case remanded for further proceedings consistent with our opinion.

It is so ordered.

JUSTICE SOUTER, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, concurring.

I agree that the Fallon Paiute-Shoshone Tribal Court had no jurisdiction to entertain Hicks's claims against the petitioning state officers here, and I join the Court's opinion. While I agree with the Court's analysis as well as its conclusion, I would reach that point by a different route. Like the Court, I take *Montana* v. *United States*, 450 U. S. 544 (1981), to be the source of the first principle on tribal-court civil jurisdiction, see *Atkinson Trading Co.* v. *Shirley*, 532 U. S. 645, 659 (2001) (SOUTER, J., concurring). But while the Court gives emphasis to measuring tribal authority here in light of the State's interest in executing its own legal process to enforce state law governing off-reservation conduct, *ante*, at 360–365, I would go right to *Montana*'s rule that a tribe's civil jurisdiction generally stops short of nonmember defendants, 450 U. S., at 565, subject only to two exceptions, one turning on "consensual relationships," the other on respect for "the political integrity, the economic security, or the health or welfare of the tribe," *id.*, at 566.[1]

Montana applied this presumption against tribal jurisdiction to nonmember conduct on fee land within a reservation; I would also apply it where, as here, a nonmember acts on tribal or trust land, and I would thus make it explicit that land status within a reservation is not a primary juris-

[1] The virtue of the Court's approach is in laying down a rule that would be unquestionably applicable even if in a future case the state officials issuing and executing state process happened to be tribal members (which they apparently are not here).

dictional fact, but is relevant only insofar as it bears on the application of one of *Montana*'s exceptions to a particular case. Insofar as I rest my conclusion on the general jurisdictional presumption, it follows for me that, although the holding in this case is "limited to the question of tribal-court jurisdiction over state officers enforcing state law," *ante*, at 358, n. 2, one rule independently supporting that holding (that as a general matter "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," *ante*, at 359) is not so confined.

I

Petitioners are certainly correct that "[t]ribal adjudicatory jurisdiction over nonmembers is . . . ill-defined," Reply Brief for Petitioners 16, since this Court's own pronouncements on the issue have pointed in seemingly opposite directions. Compare, *e. g.*, *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 65 (1978) ("Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians"), and *United States* v. *Mazurie*, 419 U. S. 544, 557 (1975) ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory"), with, *e. g.*, *Oliphant* v. *Suquamish Tribe*, 435 U. S. 191, 209 (1978) ("'[T]he limitation upon [tribes'] sovereignty amounts *to the right of governing every person within their limits except themselves*'" (quoting *Fletcher* v. *Peck*, 6 Cranch 87, 147 (1810))). *Oliphant*, however, clarified tribal courts' criminal jurisdiction (in holding that they had none as to non-Indians), and that decision is now seen as a significant step on the way to *Montana*, "the pathmarking case concerning tribal civil authority over nonmembers," *Strate* v. *A–1 Contractors*, 520 U. S. 438, 445 (1997). The path marked best is the rule

that, at least as a presumptive matter, tribal courts lack civil jurisdiction over nonmembers.[2]

To be sure, *Montana* does not of its own force resolve the jurisdictional issue in this case. There, while recognizing that the parties had "raised broad questions about the power of the Tribe to regulate [the conduct of] non-Indians on the reservation," we noted that the issue before us was a "narrow one." 450 U. S., at 557. Specifically, we said, the question presented concerned only the power of an Indian tribe to regulate the conduct of nonmembers "on reservation land owned in fee by nonmembers of the Tribe." *Ibid.* Here, it is undisputed, the acts complained of occurred on reservation land "controlled by a tribe." Pet. for Cert. 24. But although the distinction between tribal and fee land (and, accordingly, between *Montana* and this case) surely exists, it does not in my mind call for a different result. I see the legal principles that animated our presumptive preclusion of tribal jurisdiction in *Montana* as counseling a similar rule as to regulatory, and hence adjudicatory, jurisdiction here.

In *Montana*, the Court began its discussion of tribes' "inherent authority" by noting that "the Indian tribes have lost many of the attributes of sovereignty." 450 U. S., at 563.

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[2] The Court in *Montana* v. *United States*, 450 U. S. 544 (1981), referred to "nonmembers" and "non-Indians" interchangeably. In response to our decision in *Duro* v. *Reina*, 495 U. S. 676 (1990), in which we extended the rule of *Oliphant* to deny tribal courts criminal jurisdiction over nonmember Indians (*i. e.*, Indians who are members of other tribes), Congress passed a statute expressly granting tribal courts such jurisdiction, see 105 Stat. 646, 25 U. S. C. § 1301(2). Because, here, we are concerned with the extent of tribes' inherent authority, and not with the jurisdiction statutorily conferred on them by Congress, the relevant distinction, as we implicitly acknowledged in *Strate*, is between members and nonmembers of the tribe. In this case, nonmembership means freedom from tribal-court jurisdiction, since none of the petitioning state officers is identified as an Indian of any tribe.

In "distinguish[ing] between those inherent powers retained by the tribe and those divested," *id.*, at 564, the Court relied on a portion of the opinion in *United States* v. *Wheeler*, 435 U. S. 313, 326 (1978), from which it quoted at length:

> "'The areas in which . . . implicit divestiture of sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and nonmembers of the tribe*. . . .
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> "'These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently *to determine their external relations*. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve *only the relations among members of a tribe*. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status.'" *Montana*, *supra*, at 564.

The emphasis in these passages (supplied by the *Montana* Court, not by me) underscores the distinction between tribal members and nonmembers, and seems clearly to indicate, without restriction to the criminal law, that the inherent authority of the tribes has been preserved over the former but not the latter. In fact, after quoting *Wheeler*, the Court invoked *Oliphant*, *supra*, which (as already noted) had imposed a *per se* bar to tribal-court criminal jurisdiction over non-Indians, even with respect to conduct occurring on tribal land. The *Montana* Court remarked that, "[t]hough *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied" support a more "general proposition" applicable in civil cases as well, namely, that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." 450 U. S., at 565. Accordingly, the Court in *Montana* repeatedly pressed the member-nonmember distinction, reiter-

ating at one point, for example, that while "the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members," the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Id.*, at 564; cf. *Oliphant* v. *Schlie*, 544 F. 2d 1007, 1015 (CA9 1976) (Kennedy, J., dissenting) ("The concept of sovereignty applicable to Indian tribes need not include the power to prosecute nonmembers. This power, unlike the ability to maintain law and order on the reservation and to exclude nondesireable nonmembers, is not essential to the tribe's identity or its self-governing status"), rev'd *sub nom. Oliphant* v. *Suquamish Tribe*, 435 U. S. 191 (1978).

To *Montana*'s "general proposition" confining the subjects of tribal jurisdiction to tribal members, the Court appended two exceptions that could support tribal jurisdiction in some civil matters. First, a tribe may "regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." And second, a tribe may regulate nonmember conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U. S., at 565–566.[3] But unless one of these exceptions applies, the "general

[3] Thus, it is true that tribal courts' "civil subject-matter jurisdiction over non-Indians . . . is not automatically foreclosed, as an extension of *Oliphant* would require." *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U. S. 845, 855 (1985). "*Montana* did not extend the full *Oliphant* rationale to the civil jurisdictional question—which would have completely prohibited civil jurisdiction over nonmembers." *A–1 Contractors* v. *Strate*, 76 F. 3d 930, 937 (CA8 1996). Instead, "the *[Montana]* Court found that the tribe retained *some* civil jurisdiction over nonmembers, which the Court went on to describe in the *Montana* exceptions." *Ibid.*

proposition" governs and the tribe's civil jurisdiction does "not extend to the activities of nonmembers of the tribe."

In *Strate*, we expressly extended the *Montana* framework, originally applied as a measure of tribes' civil regulatory jurisdiction, to limit tribes' civil adjudicatory jurisdiction. We repeated that "absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances." 520 U. S., at 445. Quoting *Montana*, we further explained that "[i]n the main" (that is, subject to the two exceptions outlined in the *Montana* opinion), "'the inherent sovereign powers of an Indian tribe'—those powers a tribe enjoys apart from express provision by treaty or statute—'do not extend to the activities of nonmembers of the tribe.'" 520 U. S., at 445–446. Equally important for purposes here was our treatment of the following passage from *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U. S. 9 (1987), which seemed to state a more expansive jurisdictional position and which had been cited by the Tribal Court in *Strate* in support of broad tribal-court civil jurisdiction over nonmembers:

> "'Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. See *Montana* v. *United States*, 450 U. S. 544, 565–566 (1981); *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S. 134, 152–153 (1980); *Fisher* v. *District Court [of Sixteenth Judicial Dist. of Mont.]*, 424 U. S. [382,] 387–389 [(1976)]. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute . . . .' [480 U. S.], at 18." 520 U. S., at 451.

The *Strate* petitioners fastened upon the statement that "civil jurisdiction over" the activities of nonmembers on reservation lands "presumptively lies in the tribal courts." But we resisted the overbreadth of the *Iowa Mutual* dictum.

We said that the passage "scarcely supports the view that the *Montana* rule does not bear on tribal-court adjudicatory authority in cases involving nonmember defendants," 520 U. S., at 451–452, and stressed the "three informative citations" accompanying the statement, which mark the true contours of inherent tribal authority over nonmembers:

> "The first citation points to the passage in *Montana* in which the Court advanced 'the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe,' with two prime exceptions. The case cited second is *Washington* v. *Confederated Tribes of Colville Reservation*, a decision the *Montana* Court listed as illustrative of the first *Montana* exception . . . . The third case noted in conjunction with the *Iowa Mutual* statement is *Fisher* v. *District Court of Sixteenth Judicial Dist. of Mont.*, a decision the *Montana* Court cited in support of the second *Montana* exception . . . ." *Id.*, at 452 (citations omitted).

Accordingly, in explaining and distinguishing *Iowa Mutual*, we confirmed in *Strate* what we had indicated in *Montana:* that as a general matter, a tribe's civil jurisdiction does not extend to the "activities of non-Indians on reservation lands," *Iowa Mutual*, *supra*, at 18, and that the only such activities that trigger civil jurisdiction are those that fit within one of *Montana*'s two exceptions.

After *Strate*, it is undeniable that a tribe's remaining inherent civil jurisdiction to adjudicate civil claims arising out of acts committed on a reservation depends in the first instance on the character of the individual over whom jurisdiction is claimed, not on the title to the soil on which he acted. The principle on which *Montana* and *Strate* were decided (like *Oliphant* before them) looks first to human relationships, not land records, and it should make no difference *per se* whether acts committed on a reservation

occurred on tribal land or on land owned by a nonmember individual in fee. It is the membership status of the unconsenting party, not the status of real property, that counts as the primary jurisdictional fact.[4]

II

Limiting tribal-court civil jurisdiction this way not only applies the animating principle behind our precedents, but fits with historical assumptions about tribal authority and serves sound policy. As for history, JUSTICE STEVENS has observed that "[i]n sharp contrast to the tribes' broad powers over their own members, tribal powers over nonmembers have always been narrowly confined." *Merrion* v. *Jicarilla Apache Tribe*, 455 U. S. 130, 171 (1982) (dissenting opinion). His point is exemplified by the early treaties with those who became known as the five civilized Tribes, which treaties "specifically granted the right of self-government to the tribes [but] specifically excluded jurisdiction over nonmembers." *Id.*, at 171, n. 21 (citing Treaty with the Cherokees, Art. 5, 7 Stat. 481 (1835), Treaty with the Choctaws and Chickasaws, Art. 7, 11 Stat. 612 (1855), and Treaty with the Creeks and Seminoles, Art. 15, 11 Stat. 703 (1856)). In a similar vein, referring to 19th-century federal statutes setting the jurisdiction of the courts of those five Tribes, this Court said in *In re Mayfield*, 141 U. S. 107, 116 (1891), that the "general object" of such measures was "to vest in the courts of the [Indian] nation jurisdiction of all controversies between Indians, or where a member of the nation is the only party to the proceeding, and to reserve to the courts

[4] Thus, it is not that land status is irrelevant to a proper *Montana* calculus, only that it is not determinative in the first instance. Land status, for instance, might well have an impact under one (or perhaps both) of the *Montana* exceptions. See *Atkinson Trading Co.* v. *Shirley*, 532 U. S. 645, 659–660 (2001) (SOUTER, J., concurring); cf. *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, 151 (1980) ("[T]here is a significant geographic component to tribal sovereignty").

of the United States jurisdiction of all actions to which its own citizens are parties on either side." And, in fact, to this very day, general federal law prohibits Courts of Indian Offenses (tribunals established by regulation for tribes that have not organized their own tribal court systems) from exercising jurisdiction over unconsenting nonmembers. Such courts have "[c]ivil jurisdiction" only of those actions arising within their territory "in which the defendant is an Indian, and of all other suits between Indians and non-Indians which are brought before the court by stipulation of the parties." 25 CFR § 11.103(a) (2000).

A rule generally prohibiting tribal courts from exercising civil jurisdiction over nonmembers, without looking first to the status of the land on which individual claims arise, also makes sense from a practical standpoint, for tying tribes' authority to land status in the first instance would produce an unstable jurisdictional crazy quilt. Because land on Indian reservations constantly changes hands (from tribes to nonmembers, from nonmembers to tribal members, and so on), a jurisdictional rule under which land status was dispositive would prove extraordinarily difficult to administer and would provide little notice to nonmembers, whose susceptibility to tribal-court jurisdiction would turn on the most recent property conveyances. Cf. *Hodel* v. *Irving*, 481 U. S. 704, 718 (1987) (noting the difficulties that attend the "extreme fractionation of Indian lands").

The ability of nonmembers to know where tribal jurisdiction begins and ends, it should be stressed, is a matter of real, practical consequence given "[t]he special nature of [Indian] tribunals," *Duro* v. *Reina*, 495 U. S. 676, 693 (1990), which differ from traditional American courts in a number of significant respects. To start with the most obvious one, it has been understood for more than a century that the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes. See *Talton* v. *Mayes*, 163 U. S. 376, 382–385 (1896); F. Cohen, Handbook of Federal In-

dian Law 664–665 (1982 ed.) (hereinafter Cohen) ("Indian tribes are not states of the union within the meaning of the Constitution, and the constitutional limitations on states do not apply to tribes"). Although the Indian Civil Rights Act of 1968 (ICRA) makes a handful of analogous safeguards enforceable in tribal courts, 25 U. S. C. § 1302, "the guarantees are not identical," *Oliphant*, 435 U. S., at 194,[5] and there is a "definite trend by tribal courts" toward the view that they "ha[ve] leeway in interpreting" the ICRA's due process and equal protection clauses and "need not follow the U. S. Supreme Court precedents 'jot-for-jot,'" Newton, Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts, 22 Am. Indian L. Rev. 285, 344, n. 238 (1998). In any event, a presumption against tribal-court civil jurisdiction squares with one of the principal policy considerations underlying *Oliphant*, namely, an overriding concern that citizens who are not tribal members be "protected . . . from unwarranted intrusions on their personal liberty," 435 U. S., at 210.

Tribal courts also differ from other American courts (and often from one another) in their structure, in the substantive law they apply, and in the independence of their judges. Although some modern tribal courts "mirror American courts" and "are guided by written codes, rules, procedures, and guidelines," tribal law is still frequently unwritten, being based instead "on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices," and is often "handed down orally or by example from one generation to another." Melton, Indigenous Justice Systems and Tribal Society, 79 Judicature 126, 130–131 (1995). The resulting law applicable in tribal courts is a complex "mix of tribal codes and federal, state, and traditional law," National American Indian Court Judges Assn., Indian

[5] See also Cohen 667 ("Many significant constitutional limitations on federal and state governments are not included in the [ICRA]").

Courts and the Future 43 (1978), which would be unusually difficult for an outsider to sort out.

Hence the practical importance of being able to anticipate tribal jurisdiction by reference to a fact more readily knowable than the title status of a particular plot of land. One further consideration confirms the point. It is generally accepted that there is no effective review mechanism in place to police tribal courts' decisions on matters of nontribal law, since tribal-court judgments based on state or federal law can be neither removed nor appealed to state or federal courts. Cf., *e. g.*, 28 U. S. C. § 1441(a) (removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction"); § 1257(a) (Supreme Court review of "judgments or decrees rendered by the highest court of a State" where federal law implicated). The result, of course, is a risk of substantial disuniformity in the interpretation of state and federal law, a risk underscored by the fact that "[t]ribal courts are often 'subordinate to the political branches of tribal governments,'" *Duro, supra*, at 693 (quoting Cohen 334–335).

III

There is one loose end. The panel majority in the Ninth Circuit held that "the *Montana* presumption against tribal court jurisdiction does not apply in this case." 196 F. 3d 1020, 1028 (1999). Since we have held otherwise, should we now remand for application of the correct law? There is room for reasonable disagreement on this point, see *post*, at 396 (O'CONNOR, J., concurring in part and concurring in judgment), but on balance I think a remand is unnecessary. The Court's analysis of opposing state and tribal interests answers the opinion of the Ninth Circuit majority; in substance, the issues subject to the Court of Appeals's principal concern have been considered here. My own focus on the *Montana* presumption was, of course, addressed by the panel (albeit unsympathetically), and the only question that

might now be considered by the Circuit on my separate approach to the case is the applicability of the second *Montana* exception. But as Judge Rymer indicated in her dissent, the uncontested fact that the Tribal Court itself authorized service of the state warrant here bars any serious contention that the execution of that warrant adversely affected the Tribes' political integrity. See 196 F. 3d, at 1033–1034. Thus, even if my alternative rationale exclusively governed the outcome, remand would be pure formality.

JUSTICE GINSBURG, concurring.

I join the Court's opinion. As the Court plainly states, and as JUSTICE SOUTER recognizes, the "holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law." *Ante*, at 358, n. 2 (opinion of the Court); *ante*, at 376 (SOUTER, J., concurring). The Court's decision explicitly "leave[s] open the question of tribal-court jurisdiction over nonmember defendants in general," *ante*, at 358, n. 2, including state officials engaged on tribal land in a venture or frolic of their own, see *ante*, at 373 (a state officer's conduct on tribal land "unrelated to [performance of his law-enforcement duties] is potentially subject to tribal control").

I write separately only to emphasize that *Strate* v. *A–1 Contractors*, 520 U. S. 438 (1997), similarly deferred larger issues. *Strate* concerned a highway accident on a right-of-way over tribal land. For nonmember governance purposes, the accident site was equivalent to alienated, non-Indian land. *Id.*, at 456. We held that the nonmember charged with negligent driving in *Strate* was not amenable to the Tribe's legislative or adjudicatory authority. But we "express[ed] no view on the governing law or proper forum" for cases arising out of nonmember conduct on tribal land. *Id.*, at 442. The Court's opinion, as I understand it, does not reach out definitively to answer the jurisdictional questions left open in *Strate*.

JUSTICE O'CONNOR, with whom JUSTICE STEVENS and JUSTICE BREYER join, concurring in part and concurring in the judgment.

The Court holds that a tribe has no power to regulate the activities of state officials enforcing state law on land owned and controlled by the tribe. The majority's sweeping opinion, without cause, undermines the authority of tribes to "'make their own laws and be ruled by them.'" *Strate* v. *A–1 Contractors*, 520 U. S. 438, 459 (1997) (quoting *Williams* v. *Lee*, 358 U. S. 217, 220 (1959)). I write separately because Part II of the Court's decision is unmoored from our precedents.

I

A

Today, the Court finally resolves that *Montana* v. *United States*, 450 U. S. 544 (1981), governs a tribe's civil jurisdiction over nonmembers regardless of land ownership. *Ante*, at 358–360. This is done with little fanfare, but the holding is significant because we have equivocated on this question in the past.

In *Montana*, we held that the Tribe in that case could not regulate the hunting and fishing activities of nonmembers on nontribal land located within the geographical boundaries of the reservation. 450 U. S., at 557. We explained that the Tribe's jurisdiction was limited to two instances—where a consensual relationship exists between the Tribe and nonmembers, or where jurisdiction was necessary to preserve tribal sovereignty—and we concluded that neither instance applied. *Id.*, at 565–567; *ante*, at 358–360.

Given the facts of *Montana*, it was not clear whether the status of the persons being regulated, or the status of the land where the hunting and fishing occurred, led the Court to develop *Montana*'s jurisdictional rule and its exceptions. In subsequent cases, we indicated that the nonmember status of the person being regulated determined *Montana*'s

application, see, *e. g., South Dakota* v. *Bourland*, 508 U. S. 679, 694–695, and n. 15 (1993), while in other cases we indicated that the fee simple status of the land triggered application of *Montana*, see, *e. g., Strate* v. *A–1 Contractors*, *supra*, at 454, and n. 8. This is the Court's first opportunity in recent years to consider whether *Montana* applies to nonmember activity on land owned and controlled by the tribe. Cf. *Atkinson Trading Co.* v. *Shirley*, 532 U. S. 645 (2001).

The Court of Appeals concluded that *Montana* did not apply in this case because the events in question occurred on tribal land. 196 F. 3d 1020, 1028 (CA9 1999). Because *Montana* is our best source of "coherence in the various manifestations of the general law of tribal jurisdiction over non-Indians," *Atkinson Trading Co.* v. *Shirley*, *supra*, at 659 (SOUTER, J., concurring), the majority is quite right that *Montana* should govern our analysis of a tribe's civil jurisdiction over nonmembers both on and off tribal land. I part company with the majority, however, because its reasoning is not faithful to *Montana* or its progeny.

B

Montana's principles bear repeating. In *Montana*, the Court announced the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." 450 U. S., at 565. The Court further explained, however, that tribes do retain some attributes of sovereignty:

> "To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of

> non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.*, at 565–566 (citations omitted).

We concluded in that case that hunting and fishing by nonmembers on reservation land held in fee by nonmembers of the Tribe did not fit within either of the "*Montana* exceptions" that permit jurisdiction over nonmembers. The hunting and fishing in that case did not involve a consensual relationship and did not threaten the security of the Tribe. *Id.*, at 557. We "readily agree[d]" with the Court of Appeals in that case, however, that the Tribe "may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe," and that "if the Tribe permits nonmembers to fish or hunt on such lands, it may condition their entry by charging a fee or establishing . . . limits." *Ibid.* In the cases that followed, we uniformly regarded land ownership as an important factor in determining the scope of a tribe's civil jurisdiction.

We have held that the tribe's power to impose taxes on nonmembers doing business on tribal or trust lands of the reservation is "an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." *Merrion* v. *Jicarilla Apache Tribe*, 455 U. S. 130, 137 (1982). We held that the tribe's power to tax derived from two distinct sources: the tribe's power of self-government and the tribe's power to exclude. *Id.*, at 137, 149. Recognizing that tribes are "'unique aggregations possessing attributes of sovereignty,'" however, we further explained that the power to tax was "subject to constraints not imposed on other governmental entities" in that the Federal Government could take away that power. *Id.*, at 140–141.

At issue in *Brendale* v. *Confederated Tribes and Bands of Yakima Nation*, 492 U. S. 408 (1989), was whether Tribes

had the authority to zone particular tracts of land within the boundaries of the reservation owned by nonmembers. Although no opinion garnered a majority, Members of the Court determined the Tribes' zoning authority by considering the Tribes' power to exclude and the Tribes' sovereign interests in preserving the Tribes' political integrity, economic security, and health and welfare. *Id.*, at 423–425, 428–432 (White, J., joined by REHNQUIST, C. J., and SCALIA and KENNEDY, JJ.); *id.*, at 433–435, 443–444 (STEVENS, J., joined by O'CONNOR, J.); *id.*, at 454–455 (Blackmun, J., joined by Brennan and Marshall, JJ.). In the end, the Tribes' power to zone each parcel of land turned on the extent to which the Tribes maintained ownership and control over the areas in which the parcels were located. *Id.*, at 438–444, 444–447 (STEVENS, J., joined by O'CONNOR, J.).

In *South Dakota* v. *Bourland*, *supra*, we were again confronted with a Tribe's attempt to regulate hunting and fishing by nonmembers on lands located within the boundaries of the Tribe's reservation, but not owned by the tribe. In *Bourland*, the United States had acquired the land at issue from the Tribe under the Flood Control Act and the Cheyenne River Act. *Id.*, at 689–690. We concluded that these congressional enactments deprived the Tribe of "any former right of absolute and exclusive use and occupation of the conveyed lands." *Id.*, at 689. We considered that *Montana*'s exceptions might support tribal jurisdiction over nonmembers, but decided to leave that issue for consideration on remand. 508 U. S., at 695–696.

We have also applied *Montana* to decide whether a tribal court had civil jurisdiction to adjudicate a lawsuit arising out of a traffic accident on a state highway that passed through a reservation. *Strate* v. *A–1 Contractors*, 520 U. S. 438 (1997). We explained that "*Montana* delineated—in a main rule and exceptions—the bounds of the power tribes retain to exercise 'forms of civil jurisdiction'" over nonmembers. Because our prior cases did not involve jurisdiction of tribal

courts, we clarified that "[a]s to nonmembers . . . a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Id.*, at 453. Again, we considered the status of the land where the nonmember activities occurred. In accord with *Montana*, we "readily agree[d]" "that tribes retain considerable control over nonmember conduct on tribal land." 520 U. S., at 454. But we determined that the right-of-way acquired for the State's highway rendered that land equivalent to "alienated, non-Indian land." *Ibid.* Applying *Montana*, we concluded that the defendant's allegedly tortious conduct did not constitute a consensual relationship that gave rise to tribal court jurisdiction. 520 U. S., at 456–457. We also found that "[n]either regulatory nor adjudicatory authority over the state highway accident . . . is needed to preserve 'the right of reservation Indians to make their own laws and be ruled by them.'" *Id.*, at 459.

Just last month, we applied *Montana* in a case concerning a Tribe's authority to tax nonmember activity occurring on non-Indian fee land. *Atkinson Trading Co.* v. *Shirley*, 532 U. S. 645 (2001). In that case, the Tribe argued that it had the power to tax under *Merrion*, *supra*. We disagreed, distinguishing *Merrion* on the ground that the Tribe's inherent power to tax "only extended to 'transactions occurring on *trust lands* and significantly involving a tribe or its members.'" 532 U. S., at 653 (quoting *Merrion*, *supra*, at 137). We explained that "*Merrion* involved a tax that only applied to activity occurring on the reservation, and its holding is therefore easily reconcilable with the *Montana-Strate* line of authority, which we deem to be controlling." 532 U. S., at 653.

Montana and our other cases concerning tribal civil jurisdiction over nonmembers occupy a middle ground between our cases that provide for nearly absolute tribal sovereignty over tribe members, see generally *Williams* v. *Lee*, 358 U. S., at 218–223, and our rule that tribes have no inherent criminal jurisdiction over nonmembers, see *Oliphant* v. *Suqua-*

mish Tribe, 435 U. S. 191 (1978). *Montana* recognizes that tribes retain sovereign interests in activities that occur on land owned and controlled by the tribe, and provides principles that guide our determination of whether particular activities by nonmembers implicate these sovereign interests to a degree that tribal civil jurisdiction is appropriate.

C

In this case, the Court purports to apply *Montana*—in keeping with the above line of cases—to determine whether the Tribes, "as an exercise of their inherent sovereignty, . . . can regulate state wardens executing a search warrant for evidence of an off-reservation crime." *Ante*, at 358. The Court's reasoning suffers from two serious flaws: It gives only passing consideration to the fact that the state officials' activities in this case occurred on land owned and controlled by the Tribes, and it treats as dispositive the fact that the nonmembers in this case are state officials.

Under the first *Montana* exception, a tribe may exercise regulatory jurisdiction where a nonmember enters into a consensual relationship with the tribe. 450 U. S., at 565. The majority in this case dismisses the applicability of this exception in a footnote, concluding that any consensual relationship between tribes and nonmembers "clearly" must be a "private" consensual relationship "from which the official actions at issue in this case are far removed." *Ante*, at 359, n. 3.

The majority provides no support for this assertion. The Court's decision in *Montana* did not and could not have resolved the complete scope of the first exception. We could only apply the first exception to the activities presented in that case, namely, hunting and fishing by nonmembers on land owned in fee simple by nonmembers. 450 U. S., at 557. To be sure, *Montana* is "an opinion . . . not a statute," and therefore it seems inappropriate to speak of what the *Mon-*

tana Court intended the first exception to mean in future cases. See *ante*, at 372.

State governments may enter into consensual relationships with tribes, such as contracts for services or shared authority over public resources. Depending upon the nature of the agreement, such relationships could provide official consent to tribal regulatory jurisdiction. Some States have formally sanctioned the creation of state-tribal agreements. See, *e. g.*, Mont. Code Ann. § 18–11–101 *et seq.* (1997) (State-Tribal Cooperative Agreements Act); Neb. Rev. Stat. § 13–1502 *et seq.* (1997) (State-Tribal Cooperative Agreements Act); Okla. Stat., Tit. 74, § 1221 (Supp. 2001) (authorizing Governor to enter into cooperative agreements on behalf of the State to address issues of mutual interest). In addition, there are a host of cooperative agreements between tribes and state authorities to share control over tribal lands, to manage public services, and to provide law enforcement. See, *e. g.*, Cal. Health & Safety Code Ann. § 25198.1 *et seq.* (West 1992 and Supp. 2001) (cooperative agreements for hazardous waste management); Cal. Pub. Res. Code Ann. § 44201 *et seq.* (West 1996) (cooperative agreements for solid waste management); Minn. Stat. § 626.90 *et seq.* (Supp. 2001) (authorizing cooperative agreements between state law enforcement and tribal peace officers); Nev. Rev. Stat. § 277.058 (Supp. 1999) (cooperative agreements concerning sites of archeological or historical significance); N. M. Stat. Ann. § 9–11–12.1 (Supp. 2000) (cooperative agreements for tax administration); Ore. Rev. Stat. § 25.075 (1999) (cooperative agreements concerning child support and paternity matters); Wash. Rev. Code § 26.25.010 *et seq.* (1999) (cooperative agreements for child welfare); § 79.60.010 (cooperative agreements among federal, state, and tribal governments for timber and forest management).

Whether a consensual relationship between the Tribes and the State existed in this case is debatable, compare Brief for Petitioners 36–38 with Brief for Respondents Tribal Court

in and for the Fallon Paiute-Shoshone Tribes et al. 23–25, but our case law provides no basis to conclude that such a consensual relationship could never exist. Without a full understanding of the applicable relationships among tribal, state, and federal entities, there is no need to create a *per se* rule that forecloses future debate as to whether cooperative agreements, or other forms of official consent, could ever be a basis for tribal jurisdiction. Compare *ante*, at 359, n. 3, with *ante*, at 372.

The second *Montana* exception states that a tribe may regulate nonmember conduct where that conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U. S., at 566. The majority concentrates on this aspect of *Montana*, asking whether "regulatory jurisdiction over state officers in the present context is 'necessary to protect tribal self-government or to control internal relations,'" and concludes that it is not. *Ante*, at 360.

At the outset, the Court recites relatively uncontroversial propositions. A tribe's right to make its own laws and be governed by them "does not exclude all state regulatory authority on the reservation"; a reservation "'is considered part of the territory of the State'"; "States may regulate the activities even of tribe members on tribal land"; and the "'process of [state] courts may run into [a] . . . reservation.'" *Ante*, at 361, 362, 363 (citations omitted).

None of "these prior statements," however, "accord[s]" with the majority's conclusion that "tribal authority to regulate state officers in executing process related to [an off-reservation violation of state law] is not essential to tribal self-government or internal relations." *Ante*, at 364. Our prior decisions are informed by the understanding that tribal, Federal, and State Governments *share* authority over tribal lands. See, *e. g.*, *Cotton Petroleum Corp.* v. *New Mexico*, 490 U. S. 163, 176–187 (1989) (concurrent jurisdiction of state and tribal governments to impose severance taxes

on oil and gas production by nonmembers); *Rice* v. *Rehner*, 463 U. S. 713 (1983) (concurrent jurisdiction of Federal and State Governments to issue liquor licenses for transactions on reservations); *Washington* v. *Confederated Tribes of Colville Reservation*, 447 U. S. 134 (1980) (concurrent jurisdiction of state and tribal governments to tax cigarette purchases by nonmembers). Saying that tribal jurisdiction must "accommodat[e]" various sovereign interests does not mean that tribal interests are to be nullified through a *per se* rule. *Id.*, at 156.

The majority's rule undermining tribal interests is all the more perplexing because the conduct in this case occurred on land owned and controlled by the Tribes. Although the majority gives a passing nod to land status at the outset of its opinion, *ante*, at 360, that factor is not prominent in the Court's analysis. This oversight is significant. *Montana* recognizes that tribes may retain inherent power to exercise civil jurisdiction when the nonmember conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U. S., at 566. These interests are far more likely to be implicated where, as here, the nonmember activity takes place on land owned and controlled by the tribe. If *Montana* is to bring coherence to our case law, we must apply it with due consideration to land status, which has always figured prominently in our analysis of tribal jurisdiction. See *supra*, at 388–392.

This case involves state officials acting on tribal land. The Tribes' sovereign interests with respect to nonmember activities on its land are not extinguished simply because the nonmembers in this case are state officials enforcing state law. Our cases concerning tribal power often involve the competing interests of state, federal, and tribal governments. See, *e. g.*, *Cotton Petroleum Corp.*, *supra*; *Confederated Tribes*, *supra*; *Rehner*, *supra*. The actions of state officials on tribal land in some instances may affect tribal sovereign interests to a greater, not lesser, degree than the

actions of private parties. In this case, for example, it is alleged that state officers, who gained access to Hicks' property by virtue of their authority as state actors, exceeded the scope of the search warrants and damaged Hicks' personal property.

Certainly, state officials should be protected from civil liability for actions undertaken within the scope of their duties. See *infra*, at 400–401. The majority, however, does not conclude that the officials in this case were acting within the scope of their duties. Moreover, the majority finds it "irrelevant" that Hicks' lawsuits are against state officials in their personal capacities. *Ante*, at 365. The Court instead announces the rule that state officials "cannot be regulated in the performance of their law enforcement duties," but "[a]ction unrelated to that is potentially subject to tribal control." *Ante*, at 373. Here, Hicks alleges that state officials exceeded the scope of their authority under the search warrants. The Court holds that the state officials may not be held liable in Tribal Court for these actions, but never explains where these, or more serious allegations involving a breach of authority, would fall within its new rule of state official immunity.

The Court's reasoning does not reflect a faithful application of *Montana* and its progeny. Our case law does not support a broad *per se* rule prohibiting tribal jurisdiction over nonmembers on tribal land whenever the nonmembers are state officials. If the Court were to remain true to the principles that have governed in prior cases, the Court would reverse and remand the case to the Court of Appeals for a proper application of *Montana* to determine whether there is tribal jurisdiction. Compare 196 F. 3d, at 1032–1034 (Rymer, J., dissenting) (concluding that there is no jurisdiction under *Montana*), with 944 F. Supp. 1455, 1466 (Nev. 1996) (assuming, *arguendo*, that *Montana* applies and concluding that there is jurisdiction). See also *Bourland*, 508 U. S., at 695–696.

II

The Court's sweeping analysis gives the impression that this case involves a conflict of great magnitude between the State of Nevada and the Fallon Paiute-Shoshone Tribes. That is not so. At no point did the Tribes attempt to exclude the State from the reservation. At no point did the Tribes attempt to obstruct state officials' efforts to secure or execute the search warrants. Quite the contrary, the record demonstrates that judicial and law enforcement officials from the State and the Tribes acted in full cooperation to investigate an off-reservation crime. *Ante*, at 355–357; 944 F. Supp., at 1458–1459.

In this case, Hicks attempts to hold state officials (*and* tribal officials) liable for allegedly exceeding the scope of the search warrants and damaging his personal property. This case concerns the Tribes' civil *adjudicatory* jurisdiction over state officials. The Court concludes that it cannot address adjudicatory jurisdiction without first addressing the Tribes' regulatory jurisdiction. *Ante*, at 357–358. But there is no need for the Court to decide the precise scope of a tribe's regulatory jurisdiction, or to decide in this case whether a tribe's adjudicatory jurisdiction equals its regulatory jurisdiction. Cf. *ante*, at 358, 373–374.

To resolve this case, it suffices to answer the questions presented, which concern the civil adjudicatory jurisdiction of tribal courts. See Pet. for Cert. i. Petitioners contend that tribal court jurisdiction over state officials should be determined with reference to officials' claims of immunity. I agree and would resolve this case by applying basic principles of official and qualified immunity.

The state officials raised immunity defenses to Hicks' claims in Tribal Court. The Tribal Court acknowledged the officials' claims, but did not consider the immunity defenses in determining its jurisdiction. App. to Pet. for Cert. C1–C8. The Federal District Court ruled that because the Tribal Court had not decided the immunity issues, the fed-

eral court should stay its hand and not decide the immunity issues while reviewing the Tribal Court's jurisdiction. 944 F. Supp., at 1468–1469, and n. 26. The Ninth Circuit affirmed, concluding that the District Court correctly applied the exhaustion requirement to the immunity issues. 196 F. 3d, at 1029–1031. In my view, the Court of Appeals misunderstood our precedents when it refused to consider the state officials' immunity claims as it reviewed the Tribal Court's civil jurisdiction.

In determining the relationship between tribal courts and state and federal courts, we have developed a doctrine of exhaustion based on principles of comity. See, *e. g.*, *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U. S. 9 (1987); *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U. S. 845 (1985). In *National Farmers Union*, a member of the Tribe sued the local school district, an arm of the State, in a personal injury action. *Id.*, at 847. The defendants sued in federal court challenging the Tribal Court's jurisdiction. The District Court concluded that the Tribal Court lacked jurisdiction and enjoined the Tribal Court proceedings. The Court of Appeals reversed, holding that the District Court lacked jurisdiction to enter the injunction.

We reversed the Court of Appeals' conclusion that the District Court lacked jurisdiction over the federal action. We explained that the "extent to which Indian tribes have retained the power to regulate the affairs of non-Indians" is governed by federal law. *Id.*, at 851–852. Likewise, "[t]he question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law," and therefore district courts may determine under 28 U. S. C. § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction. 471 U. S., at 852.

We refused to foreclose entirely the civil jurisdiction of tribal courts over nonmembers as we had foreclosed inherent

criminal jurisdiction over nonmembers in *Oliphant* v. *Suquamish Tribe*, 435 U. S. 191 (1978). See *National Farmers*, 471 U. S., at 854–855. Instead, we reasoned that "the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." *Id.*, at 855–856 (footnote omitted). We concluded that this "examination should be conducted in the first instance in the Tribal Court itself," and that a federal court should "sta[y] its hand" until after the tribal court has had opportunity to determine its own jurisdiction. *Id.*, at 856–857.

In *Iowa Mutual*, an insurance company sued members of a Tribe in federal court on the basis of diversity jurisdiction; at the same time, a civil lawsuit by the tribal members was pending against the nonmember insurance company in Tribal Court. 480 U. S., at 11–13. The District Court granted the tribal members' motion to dismiss the federal action for lack of jurisdiction on the ground that the Tribal Court should have had the first opportunity to determine its jurisdiction. The Court of Appeals affirmed.

We reversed and remanded. We made clear that the Tribal Court should be given the first opportunity to determine its jurisdiction, but emphasized that "[e]xhaustion is required as a matter of comity, not as a jurisdictional prerequisite." *Id.*, at 16–17, and n. 8. We explained that tribal court remedies must be exhausted, but the tribal court's "determination of tribal jurisdiction is ultimately subject to review," and may be challenged in district court. *Id.*, at 19.

Later, in *Strate*, "we reiterate[d] that *National Farmers* and *Iowa Mutual* enunciate only an exhaustion requirement, a prudential rule, based on comity." 520 U. S., at 453 (internal quotation marks and citation omitted). See also *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U. S. 473, 482–487

(1999). Application of that principle in this case leads me to conclude that the District Court and the Court of Appeals should have considered the state officials' immunity claims as they determined the Tribal Court's jurisdiction.

The doctrines of official immunity, see, *e. g.*, *Westfall* v. *Erwin*, 484 U. S. 292, 296–300 (1988), and qualified immunity, see, *e. g.*, *Harlow* v. *Fitzgerald*, 457 U. S. 800, 813–819 (1982), are designed to protect state and federal officials from civil liability for conduct that was within the scope of their duties or conduct that did not violate clearly established law. These doctrines short-circuit civil litigation for officials who meet these standards so that these officials are not subjected to the costs of trial or the burdens of discovery. 457 U. S., at 817–818. For example, the Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly known as the Westfall Act, allows the United States to substitute itself for a federal employee as defendant upon certifying that the employee was acting within the scope of his duties. 28 U. S. C. § 2679(d). Nevada law contains analogous provisions. See Nev. Rev. Stat. §§ 41.032, 41.0335–41.0339 (1996 and Supp. 1999). The employee who successfully claims official immunity therefore invokes the immunity of the sovereign. When a state or federal official asserts qualified immunity, he claims that his actions were reasonable in light of clearly established law. *Anderson* v. *Creighton*, 483 U. S. 635 (1987). In those cases, we allow that official to take an immediate interlocutory appeal from an adverse ruling to ensure that the civil proceedings do not continue if immunity should be granted. *Mitchell* v. *Forsyth*, 472 U. S. 511, 524–530 (1985).

In this case, the state officials raised their immunity defenses in Tribal Court as they challenged that court's subject matter jurisdiction. App. to Pet. for Cert. J5–J6, K8, K11–K13; 196 F. 3d, at 1029–1031. Thus the Tribal Court and the Appellate Tribal Court had a full opportunity to address the immunity claims. These defendants, like other

officials facing civil liability, were entitled to have their immunity defenses adjudicated at the earliest stage possible to avoid needless litigation. It requires no "magic" to afford officials the same protection in tribal court that they would be afforded in state or federal court. *Ante*, at 373. I would therefore reverse the Court of Appeals in this case on the ground that it erred in failing to address the state officials' immunity defenses. It is possible that Hicks' lawsuits would have been easily disposed of on the basis of official and qualified immunity.

* * *

The Court issues a broad holding that significantly alters the principles that govern determinations of tribal adjudicatory and regulatory jurisdiction. While I agree that *Montana* guides our analysis, I do not believe that the Court has properly applied *Montana*. I would not adopt a *per se* rule of tribal jurisdiction that fails to consider adequately the Tribes' inherent sovereign interests in activities on their land, nor would I give nonmembers freedom to act with impunity on tribal land based solely on their status as state law enforcement officials. I would hold that *Montana* governs a tribe's civil jurisdiction over nonmembers, and that in order to protect government officials, immunity claims should be considered in reviewing tribal court jurisdiction. Accordingly, I would reverse the judgment of the United States Court of Appeals for the Ninth Circuit and remand the case for further proceedings consistent with this opinion.

JUSTICE STEVENS, with whom JUSTICE BREYER joins, concurring in the judgment.

While I join the Court's disposition of the case for the reasons stated by JUSTICE O'CONNOR, I do not agree with the Court's conclusion that tribal courts may not exercise their jurisdiction over claims seeking the relief authorized by 42

U. S. C. § 1983.[1] I agree instead with the Solicitor General's submission that a tribal court may entertain such a claim unless enjoined from doing so by a federal court. See Brief for United States as *Amicus Curiae* 24–30.

The majority's analysis of this question is exactly backwards. It appears to start from the assumption that tribal courts do not have jurisdiction to hear federal claims unless federal law expressly grants them the power, see *ante*, at 367–368, and then concludes that, because no such express grant of power has occurred with respect to § 1983, tribal courts must lack the authority to adjudicate those claims. *Ante*, at 368 ("[N]o provision in federal law provides for tribal-court jurisdiction over § 1983 actions"). But the Court's initial assumption is deeply flawed. Absent federal law to the contrary, the question whether tribal courts are courts of general jurisdiction is fundamentally one of *tribal* law. Cf. *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U. S. 473, 478 (1981) (State-court subject-matter jurisdiction is "gov-

[1] As an initial matter, it is not at all clear to me that the Court's discussion of the § 1983 issue is necessary to the disposition of this case. *Strate* v. *A–1 Contractors*, 520 U. S. 438 (1997), discusses the question whether a tribal court can exercise jurisdiction over nonmembers, irrespective of the type of claim being raised. See *id.*, at 459, n. 14 ("When . . . it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by [the main rule in] *Montana* [v. *United States*, 450 U. S. 544 (1981)], . . . it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct"). Cf. *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U. S. 473, 482, n. 4 (1999) ("*Strate* dealt with claims against nonmembers arising on state highways, and 'express[ed] no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation' "). Given the majority's determination in Part II that tribal courts lack such jurisdiction over "state wardens executing a search warrant for evidence of an off-reservation crime," *ante*, at 357, I fail to see why the Court needs to reach out to discuss the seemingly hypothetical question whether, if the tribal courts *had* jurisdiction over claims against "state wardens executing a search warrant," they could hear § 1983 claims against those wardens.

erned in the first instance by *state laws*" (emphasis added)).[2] Given a tribal assertion of general subject-matter jurisdiction, we should recognize a tribe's authority to adjudicate claims arising under § 1983 unless federal law dictates otherwise. Cf. *id.*, at 477–478 ("[S]tate courts may assume subject-matter jurisdiction over a federal cause of action absent provision by Congress to the contrary or disabling incompatibility between the federal claim and state-court adjudication").[3]

I see no compelling reason of federal law to deny tribal courts the authority, if they have jurisdiction over the par-

[2] This principle is not based upon any mystical attribute of sovereignty, as the majority suggests, see *ante*, at 366–367, but rather upon the simple, commonsense notion that it is the body creating a court that determines what sorts of claims that court will hear. The questions whether that court has the power to compel anyone to listen to it and whether its assertion of subject-matter jurisdiction conflicts with some higher law are separate issues.

[3] The majority claims that "*Strate* is [the] 'federal law to the contrary'" that explains its restriction of tribal court subject-matter jurisdiction over § 1983 suits. *Ante*, at 367, n. 8. But *Strate* merely concerned the circumstances under which tribal courts can exert jurisdiction over claims against nonmembers. See 520 U. S., at 447–448. It most certainly does *not* address the question whether, assuming such jurisdiction to exist, tribal courts can entertain § 1983 suits. Yet the majority's holding that tribal courts lack subject-matter jurisdiction over § 1983 suits would, presumably, bar those courts from hearing such claims even if jurisdiction over nonmembers would be proper under *Strate*. Accordingly, whatever else *Strate* may do, it *does not* supply the proposition of federal law upon which the majority purports to rely.

Of course, if the majority, as it suggests, is merely holding that § 1983 does not *enlarge* tribal jurisdiction beyond what is permitted by *Strate*, its decision today is far more limited than it might first appear from the Court's sometimes sweeping language. Compare *ante*, at 369 ("[T]ribal courts cannot entertain § 1983 suits"), with *ante*, at 366, n. 7 ("We conclude (as we must) that § 1983 is not . . . an enlargement [of tribal-court jurisdiction]"). After all, if the Court's holding is that § 1983 merely fails to "enlarg[e]" tribal-court jurisdiction, then nothing would prevent tribal courts from deciding § 1983 claims in cases in which they properly exercise jurisdiction under *Strate*.

ties, to decide claims arising under § 1983. Section 1983 creates no new substantive rights, see *Chapman* v. *Houston Welfare Rights Organization*, 441 U. S. 600, 617 (1979); it merely provides a federal cause of action for the violation of federal rights that are independently established either in the Federal Constitution or in federal statutory law. Despite the absence of any mention of state courts in § 1983, we have never questioned the jurisdiction of such courts to provide the relief it authorizes.[4]

Moreover, as our decision in *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U. S. 473 (1999), demonstrates, the absence of an express statutory provision for removal to a federal court upon the motion of the defendant provides no obstacle whatsoever to the granting of equivalent relief by a federal district court. See *id.*, at 485 ("Injunction against further litigation in tribal courts would in practical terms give the same result as a removal . . ."). "Why, then, the congressional silence on tribal courts? . . . [I]nadvertence seems the most likely [explanation] . . . . Now and then silence is not pregnant." *Id.*, at 487. There is really no more reason for treating the silence in § 1983 concerning tribal courts as an objection to tribal-court jurisdiction over such claims than there is for treating its silence concerning state courts as an objection to state-court jurisdiction.

In sum, I agree with the interpretation of this federal statute that is endorsed by the Solicitor General of the United States.

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[4] The authority of state courts to hear § 1983 suits was not always so uncontroversial. See, *e. g.*, Note, Limiting the Section 1983 Action in the Wake of Monroe v. Pape, 82 Harv. L. Rev. 1486, 1497, n. 62 (1969) ("State courts have puzzlingly hesitated on whether they have jurisdiction over § 1983 claims as such, and no case has been found in which a state court granted relief under the section. In one case a state supreme court adopted the expedient of disavowing a position on jurisdiction while denying recovery on the merits").

Syllabus

UNITED STATES ET AL. *v.* UNITED FOODS, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 00–276. Argued April 17, 2001—Decided June 25, 2001

The Mushroom Promotion, Research, and Consumer Information Act mandates that fresh mushroom handlers pay assessments used primarily to fund advertisements promoting mushroom sales. Respondent refused to pay the assessment, claiming that it violates the First Amendment. It filed a petition challenging the assessment with the Secretary of Agriculture, and the United States filed an enforcement action in the District Court. After the administrative appeal was denied, respondent sought review in the District Court, which consolidated the two cases. In granting the Government summary judgment, the court found dispositive the decision in *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U. S. 457, that the First Amendment was not violated when agricultural marketing orders, as part of a larger regulatory marketing scheme, required producers of California tree fruit to pay assessments for product advertising. The Sixth Circuit reversed, holding that *Glickman* did not control because the mandated payments in this case were not part of a comprehensive statutory agricultural marketing program.

Held: The assessment requirement violates the First Amendment. Pp. 409–417.

(a) Even viewing the expression here as commercial speech, there is no basis under *Glickman* or this Court's other precedents to sustain the assessments. The First Amendment may prevent the government from, *inter alia*, compelling individuals to pay subsidies for speech to which they object. See *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209; *Keller* v. *State Bar of Cal.*, 496 U. S. 1. Such precedents provide the beginning point for analysis here. Respondent wants to convey the message that its brand of mushrooms is superior to those grown by other producers, and it objects to being charged for a contrary message which seems to be favored by a majority of producers. First Amendment values are at serious risk if the government can compel a citizen or group of citizens to subsidize speech on the side that it favors; and there is no apparent principle distinguishing out of hand minor debates about whether a branded mushroom is better than just any mushroom. Thus, the compelled funding here must pass First Amendment scrutiny. Pp. 409–411.

Syllabus

(b) The program sustained in *Glickman* differs from the one at issue here in a fundamental respect: The mandated assessments for speech in that case were ancillary to a more comprehensive program restricting marketing autonomy. This Court stressed in *Glickman* that the entire regulatory program must be considered in resolving a case. There, California tree fruits were marketed under detailed marketing orders that had displaced competition to such an extent that they had an antitrust exemption; the Court presumed that the producers compelled to contribute funds for cooperative advertising were bound together and required by statute to market their products according to cooperative rules. Those important features are not present here. Most of the funds at issue are used for generic advertising; and there are no marketing orders regulating mushroom production and sales, no antitrust exemption, and nothing preventing individual producers from making their own marketing decisions. Mushroom growers are not forced to associate as a group that makes cooperative decisions. Although respondent is required simply to support speech by others, not to utter speech itself, that mandated support is contrary to the First Amendment principles set forth in cases involving expression by groups which include persons who object to the speech but, nevertheless, must remain group members by law or necessity. See, *e. g.*, *Abood*, *supra*; *Keller*, *supra*. Properly applied, *Abood*'s rule protecting against compelled assessments for some speech requires this scheme to be invalidated. Before addressing whether a conflict with freedom of belief exists, the threshold inquiry must be whether there is some state imposed obligation making group membership less than voluntary; for it is only the overriding associational purpose which allows any compelled subsidy for speech in the first place. In *Abood*, *Keller*, and *Glickman*, the objecting members were required to associate for purposes other than the compelled subsidies for speech. Here, however, the only program the Government contends the assessments serve is the very advertising scheme in question. Were it sufficient to say speech is germane to itself, *Abood*'s and *Keller*'s limits would be empty of meaning and significance. No corollary to *Glickman*'s cooperative marketing structure exists here; the expression respondent is required to support is not germane to an association's purpose independent from the speech itself; and *Abood*'s rationale extends to the party who objects to the compelled support for this speech. There is also no suggestion here that the assessments are necessary to make voluntary advertisements nonmisleading for consumers. *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626, distinguished.

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Because the Government did not raise in the Sixth Circuit its theory that this case is permissible government speech, this Court will not entertain that argument here. Pp. 411–417.

197 F. 3d 221, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, SCALIA, SOUTER, and THOMAS, JJ., joined. STEVENS, J., *post*, p. 417, and THOMAS, J., *post*, p. 418, filed concurring opinions. BREYER, J., filed a dissenting opinion, in which GINSBURG, J., joined, and in which O'CONNOR, J., joined as to Parts I and III, *post*, p. 419.

Barbara McDowell argued the cause for the United States. With her on the brief were *Acting Solicitor General Underwood, Acting Assistant Attorney General Schiffer, Deputy Solicitor General Kneedler,* and *Douglas N. Letter.*

Laurence H. Tribe argued the cause for respondent. With him on the brief were *Thomas C. Goldstein* and *Bradley A. MacLean.**

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*Briefs of *amici curiae* urging reversal were filed for the State of California et al. by *Bill Lockyer*, Attorney General of California, *Richard M. Frank*, Chief Assistant Attorney General, *Mary E. Hackenbracht*, Senior Assistant Attorney General, and *Edna Walz*, Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Ken Salazar* of Colorado, *M. Jane Brady* of Delaware, *Jennifer M. Granholm* of Michigan, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Betty D. Montgomery* of Ohio, *D. Michael Fisher* of Pennsylvania, and *Christine O. Gregoire* of Washington; for the American Mushroom Institute et al. by *John G. Roberts, Jr.*, *David G. Leitch*, and *Richard T. Rossier;* and for the Western Mushroom Marketing Association et al. by *Kendall L. Manock*, *Robert D. Wilkinson*, and *Linda Berg Othman.*

Briefs of *amici curiae* urging affirmance were filed for the Center for Individual Freedom by *Erik S. Jaffe* and *Renee Giachino;* for the Coalition of Cotton Apparel Importers by *Daniel M. Price;* for the DKT Liberty Project by *Julia M. Carpenter;* for Gerawan Farming, Inc., et al. by *Michael W. McConnell* and *Brian C. Leighton;* for the Institute for Justice by *William H. Mellor*, *Clint Bolick*, and *Scott G. Bullock;* for the Washington Legal Foundation by *Daniel J. Popeo* and *R. Shawn Gunnarson;* and for Jeanne Charter et al. by *Vernon E. Woodward* and *Lynn A. Hayes.*

JUSTICE KENNEDY delivered the opinion of the Court.

Four Terms ago, in *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U. S. 457 (1997), the Court rejected a First Amendment challenge to the constitutionality of a series of agricultural marketing orders that, as part of a larger regulatory marketing scheme, required producers of certain California tree fruit to pay assessments for product advertising. In this case a federal statute mandates assessments on handlers of fresh mushrooms to fund advertising for the product. The Court of Appeals for the Sixth Circuit determined the mandated payments were not part of a more comprehensive statutory program for agricultural marketing, thus dictating a different result than in *Glickman*. It held the assessment requirement unconstitutional, and we granted certiorari. 531 U. S. 1009 (2000).

The statute in question, enacted by Congress in 1990, is the Mushroom Promotion, Research, and Consumer Information Act, 104 Stat. 3854, 7 U. S. C. §6101 *et seq.* The Act authorizes the Secretary of Agriculture to establish a Mushroom Council to pursue the statute's goals. Mushroom producers and importers, as defined by the statute, submit nominations from among their group to the Secretary, who then designates the Council membership. 7 U. S. C. §§6104(b)(1)(B), 6102(6), 6102(11). To fund its programs, the Act allows the Council to impose mandatory assessments upon handlers of fresh mushrooms in an amount not to exceed one cent per pound of mushrooms produced or imported. §6104(g)(2). The assessments can be used for "projects of mushroom promotion, research, consumer information, and industry information." §6104(c)(4). It is undisputed, though, that most moneys raised by the assessments are spent for generic advertising to promote mushroom sales.

Respondent United Foods, Inc., is a large agricultural enterprise based in Tennessee. It grows and distributes many crops and products, including fresh mushrooms. In 1996 respondent refused to pay its mandatory assessments under

the Act. The forced subsidy for generic advertising, it contended, is a violation of the First Amendment. Respondent challenged the assessments in a petition filed with the Secretary. The United States filed an action in the United States District Court for the Western District of Tennessee, seeking an order compelling respondent to pay. Both matters were stayed pending this Court's decision in *Glickman*.

After *Glickman* was decided, the Administrative Law Judge dismissed respondent's petition, and the Judicial Officer of the Department of Agriculture affirmed. Respondent sought review in District Court, and its suit was consolidated with the Government's enforcement action. The District Court, holding *Glickman* dispositive of the First Amendment challenge, granted the Government's motion for summary judgment. App. to Pet. for Cert. 18a.

The Court of Appeals for the Sixth Circuit held this case is not controlled by *Glickman* and reversed the District Court. 197 F. 3d 221 (1999). We agree with the Court of Appeals and now affirm.

A quarter of a century ago, the Court held that commercial speech, usually defined as speech that does no more than propose a commercial transaction, is protected by the First Amendment. *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 762 (1976). "The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish." *Edenfield* v. *Fane*, 507 U. S. 761, 767 (1993).

We have used standards for determining the validity of speech regulations which accord less protection to commercial speech than to other expression. See, *e. g.*, *ibid.*; *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557 (1980). That approach, in turn, has been subject to some criticism. See, *e. g.*, *Glickman*, *supra*, at 504 (THOMAS, J., dissenting); *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S. 484, 518 (1996) (THOMAS, J., concurring in

part and concurring in judgment); *Rubin* v. *Coors Brewing Co.*, 514 U. S. 476, 493 (1995) (STEVENS, J., concurring in judgment). We need not enter into the controversy, for even viewing commercial speech as entitled to lesser protection, we find no basis under either *Glickman* or our other precedents to sustain the compelled assessments sought in this case. It should be noted, moreover, that the Government itself does not rely upon *Central Hudson* to challenge the Court of Appeals' decision, Reply Brief for Petitioners 9, n. 7, and we therefore do not consider whether the Government's interest could be considered substantial for purposes of the *Central Hudson* test. The question is whether the government may underwrite and sponsor speech with a certain viewpoint using special subsidies exacted from a designated class of persons, some of whom object to the idea being advanced.

Just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views, see *Wooley* v. *Maynard*, 430 U. S. 705, 714 (1977); *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624 (1943), or from compelling certain individuals to pay subsidies for speech to which they object. See *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209 (1977); *Keller* v. *State Bar of Cal.*, 496 U. S. 1 (1990); see also *Glickman*, *supra*, at 469, n. 13. Our precedents concerning compelled contributions to speech provide the beginning point for our analysis. The fact that the speech is in aid of a commercial purpose does not deprive respondent of all First Amendment protection, as held in the cases already cited. The subject matter of the speech may be of interest to but a small segment of the population; yet those whose business and livelihood depend in some way upon the product involved no doubt deem First Amendment protection to be just as important for them as it is for other discrete, little noticed groups in a society which values the freedom resulting from speech in all its diverse parts. First

Amendment concerns apply here because of the requirement that producers subsidize speech with which they disagree.

"[T]he general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Edenfield, supra,* at 767. There are some instances in which compelled subsidies for speech contradict that constitutional principle. Here the disagreement could be seen as minor: Respondent wants to convey the message that its brand of mushrooms is superior to those grown by other producers. It objects to being charged for a message which seems to be favored by a majority of producers. The message is that mushrooms are worth consuming whether or not they are branded. First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors; and there is no apparent principle which distinguishes out of hand minor debates about whether a branded mushroom is better than just any mushroom. As a consequence, the compelled funding for the advertising must pass First Amendment scrutiny.

In the Government's view the assessment in this case is permitted by *Glickman* because it is similar in important respects. It imposes no restraint on the freedom of an objecting party to communicate its own message; the program does not compel an objecting party (here a corporate entity) itself to express views it disfavors; and the mandated scheme does not compel the expression of political or ideological views. See *Glickman,* 521 U. S., at 469–470. These points were noted in *Glickman* in the context of a different type of regulatory scheme and are not controlling of the outcome. The program sustained in *Glickman* differs from the one under review in a most fundamental respect. In *Glickman* the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy. Here, for all practical purposes, the advertising itself,

far from being ancillary, is the principal object of the regulatory scheme.

In *Glickman* we stressed from the very outset that the entire regulatory program must be considered in resolving the case. In deciding that case we emphasized "the importance of the statutory context in which it arises." *Id.*, at 469. The California tree fruits were marketed "pursuant to detailed marketing orders that ha[d] displaced many aspects of independent business activity." *Id.*, at 469. Indeed, the marketing orders "displaced competition" to such an extent that they were "expressly exempted from the antitrust laws." *Id.*, at 461. The market for the tree fruit regulated by the program was characterized by "[c]ollective action, rather than the aggregate consequences of independent competitive choices." *Ibid.* The producers of tree fruit who were compelled to contribute funds for use in cooperative advertising "d[id] so as a part of a broader collective enterprise in which their freedom to act independently [wa]s already constrained by the regulatory scheme." *Id.*, at 469. The opinion and the analysis of the Court proceeded upon the premise that the producers were bound together and required by the statute to market their products according to cooperative rules. To that extent, their mandated participation in an advertising program with a particular message was the logical concomitant of a valid scheme of economic regulation.

The features of the marketing scheme found important in *Glickman* are not present in the case now before us. As respondent notes, and as the Government does not contest, cf. Brief for Petitioners 25, almost all of the funds collected under the mandatory assessments are for one purpose: generic advertising. Beyond the collection and disbursement of advertising funds, there are no marketing orders that regulate how mushrooms may be produced and sold, no exemption from the antitrust laws, and nothing preventing individual producers from making their own marketing decisions.

As the Court of Appeals recognized, there is no "heavy regulation through marketing orders" in the mushroom market. 197 F. 3d, at 225. Mushroom producers are not forced to associate as a group which makes cooperative decisions. "[T]he mushroom growing business . . . is unregulated, except for the enforcement of a regional mushroom advertising program," and "the mushroom market has not been collectivized, exempted from antitrust laws, subjected to a uniform price, or otherwise subsidized through price supports or restrictions on supply." *Id.*, at 222, 223.

It is true that the party who protests the assessment here is required simply to support speech by others, not to utter the speech itself. We conclude, however, that the mandated support is contrary to the First Amendment principles set forth in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity. See, *e. g.*, *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209 (1977); *Keller* v. *State Bar of Cal.*, 496 U. S. 1 (1990).

The Government claims that, despite the lack of cooperative marketing, the *Abood* rule protecting against compelled assessments for some speech is inapplicable. We did say in *Glickman* that *Abood* "recognized a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's 'freedom of belief.'" 521 U. S., at 471 (quoting *Abood*, 431 U. S., at 235). We take further instruction, however, from *Abood*'s statement that speech need not be characterized as political before it receives First Amendment protection. *Id.*, at 232. A proper application of the rule in *Abood* requires us to invalidate the instant statutory scheme. Before addressing whether a conflict with freedom of belief exists, a threshold inquiry must be whether there is some state imposed obligation which makes group membership less than voluntary; for it is only the overriding associational purpose which allows any compelled subsidy for speech in the first place. In

Abood, the infringement upon First Amendment associational rights worked by a union shop arrangement was "constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." *Id.*, at 222. To attain the desired benefit of collective bargaining, union members and nonmembers were required to associate with one another, and the legitimate purposes of the group were furthered by the mandated association.

A similar situation obtained in *Keller* v. *State Bar of Cal.*, *supra*. A state-mandated, integrated bar sought to ensure that "all of the lawyers who derive benefit from the unique status of being among those admitted to practice before the courts [were] called upon to pay a fair share of the cost." *Id.*, at 12. Lawyers could be required to pay moneys in support of activities that were germane to the reason justifying the compelled association in the first place, for example, expenditures (including expenditures for speech) that related to "activities connected with disciplining members of the Bar or proposing ethical codes for the profession." *Id.*, at 16. Those who were required to pay a subsidy for the speech of the association already were required to associate for other purposes, making the compelled contribution of moneys to pay for expressive activities a necessary incident of a larger expenditure for an otherwise proper goal requiring the cooperative activity. The central holding in *Keller*, moreover, was that the objecting members were not required to give speech subsidies for matters not germane to the larger regulatory purpose which justified the required association.

The situation was much the same in *Glickman*. As noted above, the market for tree fruit was cooperative. To proceed, the statutory scheme used marketing orders that to a large extent deprived producers of their ability to compete and replaced competition with a regime of cooperation. The mandated cooperation was judged by Congress to be necessary to maintain a stable market. Given that producers

were bound together in the common venture, the imposition upon their First Amendment rights caused by using compelled contributions for germane advertising was, as in *Abood* and *Keller*, in furtherance of an otherwise legitimate program. Though four Justices who join this opinion disagreed, the majority of the Court in *Glickman* found the compelled contributions were nothing more than additional economic regulation, which did not raise First Amendment concerns. *Glickman*, 521 U. S., at 474; see *id.*, at 477 (SOUTER, J., dissenting).

The statutory mechanism as it relates to handlers of mushrooms is concededly different from the scheme in *Glickman;* here the statute does not require group action, save to generate the very speech to which some handlers object. In contrast to the program upheld in *Glickman*, where the Government argued the compelled contributions for advertising were "part of a far broader regulatory system that does not principally concern speech," Reply Brief for Petitioner, O. T. 1996, No. 95–1184, p. 4, there is no broader regulatory system in place here. We have not upheld compelled subsidies for speech in the context of a program where the principal object is speech itself. Although greater regulation of the mushroom market might have been implemented under the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U. S. C. § 601 *et seq.*, the compelled contributions for advertising are not part of some broader regulatory scheme. The only program the Government contends the compelled contributions serve is the very advertising scheme in question. Were it sufficient to say speech is germane to itself, the limits observed in *Abood* and *Keller* would be empty of meaning and significance. The cooperative marketing structure relied upon by a majority of the Court in *Glickman* to sustain an ancillary assessment finds no corollary here; the expression respondent is required to support is not germane to a purpose related to an association independent from the speech itself; and the rationale of *Abood* extends to the party

who objects to the compelled support for this speech. For these and other reasons we have set forth, the assessments are not permitted under the First Amendment.

Our conclusions are not inconsistent with the Court's decision in *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626 (1985), a case involving attempts by a State to prohibit certain voluntary advertising by licensed attorneys. The Court invalidated the restrictions in substantial part but did permit a rule requiring that attorneys who advertised by their own choice and who referred to contingent fees should disclose that clients might be liable for costs. Noting that substantial numbers of potential clients might be misled by omission of the explanation, the Court sustained the requirement as consistent with the State's interest in "preventing deception of consumers." *Id.*, at 651. There is no suggestion in the case now before us that the mandatory assessments imposed to require one group of private persons to pay for speech by others are somehow necessary to make voluntary advertisements nonmisleading for consumers.

The Government argues the advertising here is government speech, and so immune from the scrutiny we would otherwise apply. As the Government admits in a forthright manner, however, this argument was "not raised or addressed" in the Court of Appeals. Brief for Petitioners 32, n. 19. The Government, citing *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374 (1995), suggests that the question is embraced within the question set forth in the petition for certiorari. In *Lebron*, the theory presented by the petitioner in the brief on the merits was addressed by the court whose judgment was being reviewed. *Id.*, at 379. Here, by contrast, it is undisputed that the Court of Appeals did not mention the government speech theory now put forward for our consideration.

The Government's failure to raise its argument in the Court of Appeals deprived respondent of the ability to ad-

dress significant matters that might have been difficult points for the Government. For example, although the Government asserts that advertising is subject to approval by the Secretary of Agriculture, respondent claims the approval is *pro forma*. This and other difficult issues would have to be addressed were the program to be labeled, and sustained, as government speech.

We need not address the question, however. Although in some instances we have allowed a respondent to defend a judgment on grounds other than those pressed or passed upon below, see, *e. g.*, *United States* v. *Estate of Romani*, 523 U. S. 517, 526, n. 11 (1998), it is quite a different matter to allow a petitioner to assert new substantive arguments attacking, rather than defending, the judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it. Just this Term we declined an invitation by an *amicus* to entertain new arguments to overturn a judgment, see *Lopez* v. *Davis*, 531 U. S. 230, 244, n. 6 (2001), and we consider it the better course to decline a party's suggestion for doing so in this case.

For the reasons we have discussed, the judgment of the Court of Appeals is

Affirmed.

JUSTICE STEVENS, concurring.

JUSTICE BREYER has correctly noted that the program at issue in this case, like that in *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U. S. 457 (1997), "does not compel speech itself; it compels the payment of money." *Post*, at 425 (dissenting opinion). This fact suffices to distinguish these compelled subsidies from the compelled speech in cases like *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624 (1943), and *Wooley* v. *Maynard*, 430 U. S. 705 (1977). It does not follow, however, that the First Amendment is not implicated when a person is forced to subsidize speech to which he objects. *Keller* v. *State Bar of Cal.*, 496 U. S. 1, 13–14

(1990). As we held in *Glickman*, *Keller*, and a number of other cases, such a compelled subsidy is permissible when it is ancillary, or "germane," to a valid cooperative endeavor. The incremental impact on the liberty of a person who has already surrendered far greater liberty to the collective entity (either voluntarily or as a result of permissible compulsion) does not, in my judgment, raise a significant constitutional issue if it is ancillary to the main purpose of the collective program.

This case, however, raises the open question whether such compulsion is constitutional when nothing more than commercial advertising is at stake. The naked imposition of such compulsion, like a naked restraint on speech itself, seems quite different to me.* We need not decide whether other interests, such as the health or artistic concerns mentioned by JUSTICE BREYER, *post*, at 428, might justify a compelled subsidy like this, but surely the interest in making one entrepreneur finance advertising for the benefit of his competitors, including some who are not required to contribute, is insufficient.

JUSTICE THOMAS, concurring.

I agree with the Court that *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U. S. 457 (1997), is not controlling. I write separately, however, to reiterate my views that "paying money for the purposes of advertising involves speech," and that "compelling speech raises a First Amend-

*The Court has held that the First Amendment is implicated by government regulation of contributions and expenditures for political purposes. *Buckley* v. *Valeo*, 424 U. S. 1 (1976) *(per curiam)*. Although it by no means follows that the reasoning in such cases would apply to the regulation of expenditures for advertising, I think it clear that government compulsion to finance objectionable speech imposes a greater restraint on liberty than government regulation of money used to subsidize the speech of others. Even in the commercial speech context, I think it entirely proper for the Court to rely on the First Amendment when evaluating the significance of such compulsion.

ment issue just as much as restricting speech." *Id.*, at 504 (THOMAS, J., dissenting). Any regulation that compels the funding of advertising must be subjected to the most stringent First Amendment scrutiny.

JUSTICE BREYER, with whom JUSTICE GINSBURG joins, and with whom JUSTICE O'CONNOR joins as to Parts I and III, dissenting.

The Court, in my view, disregards controlling precedent, fails properly to analyze the strength of the relevant regulatory and commercial speech interests, and introduces into First Amendment law an unreasoned legal principle that may well pose an obstacle to the development of beneficial forms of economic regulation. I consequently dissent.

I

Only four years ago this Court considered a case very similar to this one, *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U. S. 457 (1997). The issue there, like here, was whether the First Amendment prohibited the Government from collecting a fee for collective product advertising from an objecting grower of those products (nectarines, peaches, and plums). We held that the collection of the fee did not "rais[e] a First Amendment issue for us to resolve," but rather was "simply a question of economic policy for Congress and the Executive to resolve." *Id.*, at 468. We gave the following reasons in support of our conclusion:

> "First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. Second, they do not compel any person to engage in any actual or symbolic speech. Third, they do not compel the producers to endorse or to finance any political or ideological views." *Id.*, at 469–470.

This case, although it involves mushrooms rather than fruit, is identical in each of these three critical respects. No one, including the Court, claims otherwise. And I believe these similar characteristics demand a similar conclusion.

The Court sees an important difference in what it says is the fact that *Wileman*'s fruit producers were subject to regulation (presumably price and supply regulation) that "'displaced competition,'" to the "extent that they were 'expressly exempted from the antitrust laws.'" *Ante*, at 412 (quoting 521 U. S., at 461). The mushroom producers here, it says, are not "'subjected to a uniform price, . . . restrictio[n] on supply,'" *ante*, at 413 (quoting 197 F. 3d 221, 222, 223 (CA6 1999)), or any other "common venture" that "depriv[es]" them of the "ability to compete," *ante*, at 414. And it characterizes this difference as "fundamental." *Ante*, at 411.

But the record indicates that the difference to which the Court points could not have been critical. The Court in *Wileman* did not refer to the *presence* of price or output regulations. It referred to the fact that Congress had "*authorized*" that kind of regulation. 521 U. S., at 462 (emphasis added). See also *id.*, at 461 (citing agricultural marketing statute while noting that marketing orders issued under its authority "*may* include" price and quantity controls (emphasis added)). Both then-existing federal regulations and JUSTICE SOUTER's dissenting opinion make clear that, at least in respect to some of *Wileman*'s marketing orders, price and output regulations, while "authorized," were not, in fact, in place. See 7 CFR pts. 916, 917 (1997) (setting forth container, packaging, grade, and size regulations, but not price and output regulations); 521 U. S., at 500, n. 13 (SOUTER, J., dissenting) (noting that "the extent to which the Act eliminates competition varies among different marketing orders"). In this case, just as in *Wileman*, the Secretary of Agriculture is *authorized* to promulgate price and supply regulations. See *ante*, at 415 ("greater regula-

tion of the mushroom market might have been implemented under the Agricultural Marketing Agreement Act of 1937"); 7 U. S. C. §§ 608c(2), (6)(A), (7). But in neither case has she actually done so. Perhaps that is why the Court in *Wileman* did not rely heavily upon the existence of the Secretary's authority to regulate prices or output. See 521 U. S., at 469 (noting statutory scheme in passing).

Regardless, it is difficult to understand why the presence or absence of price and output regulations could make a critical First Amendment difference. The Court says that collective fruit advertising (unlike mushroom advertising) was the "logical concomitant" of the more comprehensive "economic" regulatory "scheme." *Ante*, at 412. But it does not explain how that could be so. Producer price-fixing schemes seek to keep prices higher than market conditions might otherwise dictate, as do restrictions on supply. Antitrust exemptions are a "logical concomitant," for otherwise the price or output agreement might be held unlawful. But collective advertising has no obvious comparable connection. As far as *Wileman* or the record here suggests, collective advertising might, or might not, help bring about prices higher than market conditions would otherwise dictate. Certainly nothing in *Wileman* suggests the contrary. Cf. 521 U. S., at 477 (SOUTER, J., dissenting) (criticizing the Court for not requiring advertising program to be "reasonably necessary to implement the regulation").

By contrast, the advertising here relates directly, not in an incidental or subsidiary manner, to the regulatory program's underlying goal of "maintain[ing] and expand[ing] existing markets and uses for mushrooms." 7 U. S. C. § 6101(b)(2). As the Mushroom Act's economic goals indicate, collective promotion and research is a perfectly traditional form of government intervention in the marketplace. Promotion may help to overcome inaccurate consumer perceptions about a product. See Hearings on H. R. 1776 et al. before the Subcommittee on Domestic Marketing, Consumer Relations,

and Nutrition of the House Committee on Agriculture, 101st Cong., 1st Sess., 99 (1989) (hereinafter Hearings) (statement of Rep. Grant) (noting need to overcome consumer fears about safety of eating mushrooms and that per capita mushroom consumption in Canada was twice that of United States). Overcoming those perceptions will sometimes bring special public benefits. See 7 U. S. C. §§ 6101(a)(1)–(3) (mushrooms are "valuable part of the human diet," and their production "benefits the environment"). And compelled payment may be needed to produce those benefits where, otherwise, some producers would take a free ride on the expenditures of others. See Hearings 95–96 (statement of James Ciarrocchi) ("The . . . industry has embarked on several voluntary promotion campaigns over the years. . . . [A] lesson from every one . . . has been unreliability, inefficiency, and inequities of voluntary participation").

Compared with traditional "command and control," price, or output regulation, this kind of regulation—which relies upon self-regulation through industry trade associations and upon the dissemination of information—is more consistent, not less consistent, with producer choice. It is difficult to see why a Constitution that seeks to protect individual freedom would consider the absence of "heavy regulation," *ante*, at 413, to amount to a special, determinative reason for refusing to permit this less intrusive program. If the Court classifies the former, more comprehensive regulatory scheme as "economic regulation" for First Amendment purposes, it should similarly classify the latter, which does not differ significantly but for the comparatively greater degree of freedom that it allows.

The Court invokes in support of its conclusion other First Amendment precedent, namely, *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209 (1977), *Keller* v. *State Bar of Cal.*, 496 U. S. 1 (1990), *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624 (1943), and *Wooley* v. *Maynard*, 430 U. S. 705 (1977). But those cases are very different. The first two, *Abood* and

Keller, involved compelled contributions by employees to trade unions and by lawyers to state bar associations, respectively. This Court held that the compelled contributions were unlawful (1) to the extent that they helped fund subsidiary activities of the organization, *i. e.*, activities *other than* those that legally justified a compelled contribution; and (2) because the subsidiary activities in question were political activities that might "conflict with one's 'freedom of belief.'" *Wileman*, *supra*, at 471 (quoting *Abood*, *supra*, at 235). See *Keller*, *supra*, at 15 (communications involving abortion, prayer in the public schools, and gun control); *Abood*, *supra*, at 213 (communications involving politics and religion).

By contrast, the funded activities here, like identical activities in *Wileman*, do *not* involve this kind of expression. In *Wileman* we described the messages at issue as incapable of "engender[ing] any crisis of conscience" and the producers' objections as "trivial." 521 U. S., at 471, 472. The messages here are indistinguishable. Compare Brief for Respondent 10–11 (objecting to advertising because it treats branded and unbranded mushrooms alike, associates mushrooms "with the consumption of alcohol and . . . tout[s] mushrooms as an aphrodisiac") with *Wileman*, *supra*, at 467, n. 10 (dismissing objections to advertising that suggested "'all varieties of California fruit to be of equal quality,'" and included "'sexually subliminal messages as evidenced by an ad depicting a young girl in a wet bathing suit'") (quoting District Court opinion). See also Appendix, *infra*. The compelled contribution here relates directly to the regulatory program's basic goal.

Neither does this case resemble either *Barnette* or *Wooley*. *Barnette* involved compelling children, contrary to their conscience, to salute the American flag. 319 U. S., at 632. *Wooley* involved compelling motorists, contrary to their conscience, to display license plates bearing the State's message "Live Free or Die." 430 U. S., at 707. In *Wileman*

we found *Barnette* and *Wooley*, and *all* of "our compelled speech case law . . . clearly inapplicable" to compelled financial support of generic advertising. 521 U. S., at 470. See also *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626, 651 (1985) (refusing to apply *Wooley* and *Barnette* in a commercial context where "the interests at stake in this case are not of the same order"). We explained:

> "The use of assessments to pay for advertising does not require respondents to repeat an objectionable message out of their own mouths, cf. *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 632 (1943), require them to use their own property to convey an antagonistic ideological message, cf. *Wooley* v. *Maynard*, 430 U. S. 705 (1977); *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n of Cal.*, 475 U. S. 1, 18 (1986) (plurality opinion), force them to respond to a hostile message when they 'would prefer to remain silent,' see *ibid.*, or require them to be publicly identified or associated with another's message, cf. *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, 88 (1980). Respondents are . . . merely required to make contributions for advertising." *Wileman*, *supra*, at 470–471.

These statements are no less applicable to the present case. How can the Court today base its holding on *Barnette*, *Wooley*, *Abood*, and *Keller*—the very same cases that we expressly distinguished in *Wileman*?

II

Nearly every human action that the law affects, and virtually all governmental activity, involves speech. For First Amendment purposes this Court has distinguished among contexts in which speech activity might arise, applying special speech-protective rules and presumptions in some of those areas, but not in others. See, *e. g.*, *Board of Regents*

of Univ. of Wis. System v. *Southworth*, 529 U. S. 217, 229 (2000) (indicating that less restrictive rules apply to governmental speech); *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, 564 (1980) (commercial speech subject to "mid-level" scrutiny); *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, 568 (1968) (applying special rules applicable to speech of government employees). Were the Court not to do so—were it to apply the strictest level of scrutiny in every area of speech touched by law—it would, at a minimum, create through its First Amendment analysis a serious obstacle to the operation of well-established, legislatively created, regulatory programs, thereby seriously hindering the operation of that democratic self-government that the Constitution seeks to create and to protect. Cf. Post, The Constitutional Status of Commercial Speech, 48 UCLA L. Rev. 1, 9–10 (2000).

That, I believe, is why it is important to understand that the regulatory program before us is a "species of economic regulation," *Wileman*, 521 U. S., at 477, which does not "warrant special First Amendment scrutiny," *id.*, at 474. Irrespective of *Wileman* I would so characterize the program for three reasons.

First, the program does not significantly interfere with protected speech interests. It does not compel speech itself; it compels the payment of money. Money and speech are not identical. Cf. *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 388–389 (2000); *id.*, at 398 (STEVENS, J., concurring) ("Money is property; it is not speech"); *id.*, at 400 (BREYER, J., concurring) ("[A] decision to contribute money to a campaign is a matter of First Amendment concern—not because money *is* speech (it is not); but because it *enables* speech"). Indeed, the contested requirement—that individual producers make a payment to help achieve a governmental objective—resembles a targeted tax. See *Southworth*, 529 U. S., at 241 (SOUTER, J., joined by STEVENS

and BREYER, JJ., concurring in judgment) ("[T]he university fee at issue is a tax"). And the "government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties." *Id.*, at 229 (majority opinion). Cf. *Regan* v. *Taxation With Representation of Wash.*, 461 U. S. 540, 547 (1983) ("Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes").

Second, this program furthers, rather than hinders, the basic First Amendment "commercial speech" objective. The speech at issue amounts to ordinary product promotion within the commercial marketplace—an arena typically characterized both by the need for a degree of public supervision and the absence of a special democratic need to protect the channels of public debate, *i. e.*, the communicative process itself. Cf. Post, *supra*, at 14–15. No one here claims that the mushroom producers are restrained from contributing to a public debate, moving public opinion, writing literature, creating art, invoking the processes of democratic self-government, or doing anything else more central to the First Amendment's concern with democratic self-government.

When purely commercial speech is at issue, the Court has described the First Amendment's basic objective as protection of the consumer's interest in the free flow of truthful commercial information. See, *e. g.*, *Edenfield* v. *Fane*, 507 U. S. 761, 766 (1993) ("First Amendment coverage of commercial speech is designed to safeguard" society's "interes[t] in broad access to complete and accurate commercial information"); *Zauderer*, *supra*, at 651 ("[T]he extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information"); *Central Hudson*, *supra*, at 563 ("The First Amendment's concern for commercial speech is based on the informational function of advertising"); *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765, 783 (1978) ("A commercial advertisement is constitutionally protected not so much

because it pertains to the seller's business as because it furthers the societal interest in the 'free flow of commercial information'") (quoting *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 764 (1976)). Unlike many of the commercial speech restrictions this Court has previously addressed, the program before us promotes the dissemination of truthful information to consumers. And to sustain the objecting producer's constitutional claim will likely make less information, not more information, available. Perhaps that is why this Court has not previously applied "compelled speech" doctrine to strike down laws requiring provision of additional commercial speech.

Third, there is no special risk of other forms of speech-related harm. As I have previously pointed out, and *Wileman* held, there is no risk of significant harm to an individual's conscience. *Supra*, at 423–424. The program does not censor producer views unrelated to its basic regulatory justification. *Supra*, at 420–421. And there is little risk of harming any "discrete, little noticed grou[p]." *Ante*, at 410. The Act excludes small producers, 7 U. S. C. §§ 6102(6), (11) (exempting those who import or produce less than 500,000 pounds of mushrooms annually)—unlike respondent, a large, influential corporation. The Act contains methods for implementing its requirements democratically. See §§ 6104(b)(1)(B), (g)(2) (Mushroom Council, which sets assessment rate, is composed entirely of industry representatives); §§ 6105(a), (b) (referendum required before Secretary of Agriculture's order can go into effect and five years thereafter, and producers may request additional referenda). And the Act provides for supervision by the Secretary. § 6104(d)(3) (requiring Secretary to approve all advertising programs). See also *Wileman*, 521 U. S., at 477 (refusing to upset "the judgment of the majority of market participants, bureaucrats, and legislators who have concluded that [collective advertising] programs are beneficial"). These safeguards protect

against abuse of the program, such as "making one entrepreneur finance advertising for the benefit of his competitors." *Ante*, at 418 (STEVENS, J., concurring). Indeed, there is no indication here that the generic advertising promotes some brands but not others. And any "debat[e]" about branded versus nonbranded mushrooms, *ante*, at 411 (majority opinion), is identical to that in *Wileman*. *Supra*, at 423–424.

Taken together, these circumstances lead me to classify this common example of government intervention in the marketplace as involving a form of economic regulation, not "commercial speech," for purposes of applying First Amendment presumptions. And seen as such, I cannot find the program lacks sufficient justification to survive constitutional scrutiny. *Wileman*, *supra*, at 476–477.

The Court, in applying stricter First Amendment standards and finding them violated, sets an unfortunate precedent. That precedent suggests, perhaps requires, striking down any similar program that, for example, would require tobacco companies to contribute to an industry fund for advertising the harms of smoking or would use a portion of museum entry charges for a citywide campaign to promote the value of art. Moreover, because of its uncertainty as to how much governmental involvement will produce a form of immunity under the "government speech" doctrine, see *ante*, at 417, the Court infects more traditional regulatory requirements—those related, say, to warranties or to health or safety information—with constitutional doubt.

Alternatively, the Court's unreasoned distinction between heavily regulated and less heavily regulated speakers could lead to less First Amendment protection in that it would deprive the former of protection. But see *Consolidated Edison Co. of N. Y.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 530, 534, n. 1 (1980) (Even "heavily regulated businesses may enjoy constitutional protection") (citing, as an example, *Virginia Bd. of Pharmacy*, *supra*, at 763–765).

At a minimum, the holding here, when contrasted with that in *Wileman*, creates an incentive to increase the Government's involvement in any information-based regulatory program, thereby unnecessarily increasing the degree of that program's restrictiveness. I do not believe the First Amendment seeks to limit the Government's economic regulatory choices in this way—any more than does the Due Process Clause. Cf. *Lochner* v. *New York*, 198 U. S. 45 (1905).

III

Even if I were to classify the speech at issue here as "commercial speech" and apply the somewhat more stringent standard set forth in the Court's commercial speech cases, I would reach the same result. That standard permits restrictions where they "directly advance" a "substantial" government interest that could not "be served as well by a more limited restriction." *Central Hudson*, 447 U. S., at 564. I have already explained why I believe the Government interest here is substantial, at least when compared with many typical regulatory goals. *Supra*, at 422. It remains to consider whether the restrictions are needed to advance its objective.

Several features of the program indicate that its speech-related aspects, *i. e.*, its compelled monetary contributions, are necessary and proportionate to the legitimate promotional goals that it seeks. At the legislative hearings that led to enactment of the Act, industry representatives made clear that pre-existing efforts that relied upon voluntary contributions had not worked. Thus, compelled contributions may be necessary to maintain a collective advertising program in that rational producers would otherwise take a free ride on the expenditures of others. See *ibid.*; *Abood*, 431 U. S., at 222 (relying upon "free rider" justification in union context).

At the same time, those features of the program that led *Wileman*'s dissenters to find its program disproportionately restrictive are absent here. *Wileman*'s statutory scheme covered various different agricultural commodities and imposed a patchwork of geographically based limitations while "prohibit[ing] orders of national scope"—all for no apparent reason. 521 U. S., at 499 (SOUTER, J., dissenting). The law at issue here, however, applies only to mushrooms, and says explicitly that "[a]ny" mushroom order "shall be national in scope." 7 U. S. C. § 6103(a). Cf. *Wileman*, *supra*, at 493 (SOUTER, J., dissenting) ("[I]f the Government were to attack these problems across an interstate market for a given agricultural commodity or group of them, the substantiality of the national interest would not be open to apparent question . . .").

Nor has the Government relied upon "[m]ere speculation" about the effect of the advertising. *Wileman*, *supra*, at 501 (SOUTER, J., dissenting). Rather, it has provided empirical evidence demonstrating the program's effect. See Food Marketing & Economics Group, Mushroom Council Program Effectiveness Review, 1999, p. 6 (Feb. 2000), lodging for United States (available in Clerk of Court's case file) (finding that "for every million dollars spent by the Mushroom Council . . . the growth rate [of mushroom sales] increases by 2.1%"). In consequence, whatever harm the program may cause First Amendment interests is proportionate. Cf. *Bartnicki* v. *Vopper*, 532 U. S. 514, 535 (2001) (BREYER, J., concurring).

The Court's decision converts "a question of economic policy for Congress and the Executive" into a "First Amendment issue," contrary to *Wileman*. 521 U. S., at 468 (internal quotation marks and citation omitted). Nor can its holding find support in basic First Amendment principles.

For these reasons, I dissent.

[Appendix to opinion of BREYER, J., follows this page.]

APPENDIX TO OPI

Romance is about the little things you do to show your love for the special one in your life. It doesn't have to be showy, expensive or complicated. In fact, a special meal can be the simplest and most personal way to romance the one you love. Remember, the old saying doesn't just apply to men, the way to **anyone's** heart is through their stomach. The following tips, menus and recipes will help your love mushroom year-round. Bon Appetit!

Setting the Mood

Candlelight is a must, casting a warm glow over the entire room. For something different, place fragrant gardenias and floating votives in a bowl of water.

Flowers: Don't only put them on the table — strategically place bouquets of your partner's favorite flower around the house. You'll fill the air with romance and fragrance.

Guests aren't the only ones deserving of your best china. Set an elegant table from fine linens to polished silver and your message of care will be evident.

Never underestimate the power of the written word. Sending a formal invitation will help set the mood.

Thumb through your music collection and select romantic CDs. Play them softly throughout your meal.

Don't limit yourself to dinner only. Surprise your loved one with a romantic breakfast in bed, picnic lunch or late-night snack.

Simple Pleasures

Remember it's not necessarily what you cook or how expensive the ingredients but the care and time you put into making it and the reason why you're doing it.

Don't always stick to the traditional, be creative! Serve an entire meal of finger foods and feed each other. Try raw vegetables with a zesty cracked peppercorn dip, stuffed mushroom caps, jumbo prawns and cocktail sauce, a variety of olives, pickles, breads and cheeses and decadent fudgy brownies for dessert.

Selecting the Menu

Consider likes and dislikes when scanning recipes. Keep in mind what's currently in season and what can be prepared ahead of time. Mushrooms lend gourmet appeal for little cost and are available year-round.

Keep it simple. Pick up deli-prepared roasted chicken and potatoes when there's no time to cook. Add a tossed green salad and serve a bakery-prepared fruit tart for dessert.

Your menu doesn't have to be complicated or fancy. Buy a heart-shaped pan to add instant amour to baked dishes or desserts.

Make a homemade pizza with mushrooms arranged on top in the shape of a heart. Remember it's the little things you do.

Finishing Touches

Dress for the occasion. Put on your favorite dress or sportscoat and tie and ask your partner to do the same. Formal attire in itself lends romance and excitement to the occasion.

Rent a romantic movie for after your meal – *Casablanca, West Side Story, Ghost, When Harry Met Sally* and *Sleepless In Seattle* are all sure to inspire cuddling.

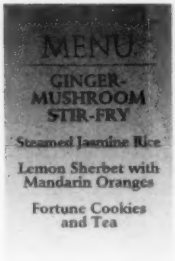
Clearing the table and doing the dishes together by hand can be fun and even romantic. There's a certain comfort to the phrase, *"You wash, I'll dry."*

A Passion For Mushrooms

- The ancient philosopher Petronius and many others proclaimed mushrooms as a potent aphrodisiac and popular "love" food.
- For centuries, legends have attributed mushrooms with special mystical powers that cure illness, prolong life and enhance sexuality.
- The Egyptian pharaohs, who were considered gods as well as kings, declared mushrooms sacred and reserved them for their own use.
- Brillat-Savarin wrote in *The Physiology of Taste* that certain varieties of mushrooms can make women more tender and men more apt to love.

"After a perfect meal we are more susceptible to the ecstasy of love than at any other time."
— Dr. Hans Bazli

"There is no love sincerer than the love of food." — George Bernard Shaw



GINGER-MUSHROOM STIR-FRY

3 tablespoons *each* lemon juice and soy sauce
1 tablespoon grated fresh ginger
2 cloves garlic, pressed
2 skinned and boned chicken breast halves, cut into strips about 1/2 inch thick
1/3 cup chicken broth or bouillon
2 teaspoons cornstarch
Vegetable oil
8 ounces fresh mushrooms, quartered
1 1/2 cups asparagus **or** green bean slices, about 1 1/2 inches long
3 green onions, sliced diagonally into 1-inch pieces
Toasted sesame seeds
Lemon slices
Cilantro **or** parsley sprigs

In bowl combine lemon juice, soy sauce, ginger and garlic. Add chicken, tossing to coat; set aside. Measure broth; dissolve cornstarch in broth. In skillet or wok heat 1 to 2 tablespoons oil to sizzling. Drain chicken, reserving liquid. Add mushrooms and chicken to skillet. Toss over high heat until chicken loses pink color. Add asparagus and onions; continue to toss over high heat until chicken juices run clear and vegetables are crisp-tender. Stir in broth mixture to thicken. Sprinkle with sesame seeds. Serve hot, over rice, if desired. Garnish with lemon slices and cilantro.

Makes 4 servings

MENU
MUSHROOM CAESAR SALAD
Sautéed Chicken Breasts with Lemon and Capers
Buttered Angel Hair Pasta
Strawberries Dipped in White Chocolate

MUSHROOM CAESAR SALAD

Garlic Croutons (recipe follows)
2 cloves garlic
1 can (2 ounces) anchovies, drained
1/2 cup olive oil
1/4 cup lemon juice
1/2 teaspoon Dijon-style mustard
1/2 teaspoon Worcestershire sauce
Coarsely ground black pepper, to taste
4 ounces fresh mushrooms, sliced
1 head romaine lettuce, washed and dried
1/2 cup drained marinated dried tomatoes (reserve oil)
1/4 cup grated Parmesan cheese

Prepare Garlic Croutons; set aside. To prepare dressing, pulse garlic and anchovies in container of electric food processor or blender until finely minced. Add oil, lemon juice, mustard and Worcestershire sauce; blend thoroughly. Season with pepper. Mix dressing with mushrooms. To serve salad, gently tear lettuce into salad bowl. Top with Garlic Croutons, tomatoes and cheese. Spoon dressing and mushrooms over salad. Toss and serve immediately.

Makes 4 to 6 servings

GARLIC CROUTONS: Preheat oven to 325 degrees. In large skillet over medium heat warm 3 tablespoons oil (from marinated dried tomatoes) and 2 cloves chopped garlic. Add 3 cups 1/2-inch bread cubes; toss to coat. Transfer to baking sheet in single layer. Bake, tossing occasionally, until crisp and golden, 12 to 15 minutes. Cool.

MUSHROOMS

VARIETIES	FLAVOR	USAGE
Agaricus (button)	Mild flavor which intensifies when cooked. Those with open veils have a richer, more intense taste.	Extremely versatile. Add to soups, sauces, salads and pasta. Serve raw with dips, or sauté to top meat or poultry.
Crimini	Meaty, rich flavor, more intense than agaricus.	Substitute in any recipe calling for agaricus. Serve with beef, stir-frys and vegetable sautes.
Shiitake	Full-bodied, meaty flavor and spongy texture when cooked.	Saute in butter with garlic, grill or add to soups, seafood, poultry and meat dishes.
Oyster	Soft, meaty texture and delicate flavor when cooked.	Slice raw in salads, add to sauces or cook with chicken, seafood, veal, pork, or vegetable dishes.
Enoki	Light, mild flavor and crisp texture.	Toss in salads, tuck into sandwiches, and use as a garnish for soups.

MUSHROOM COUNCIL
2200-B DOUGLAS BLVD., SUITE 220
ROSEVILLE, CA 95661

Mushroom Tips

STORAGE

Store pre-packaged mushrooms in their original containers in the refrigerator and bulk mushrooms in a paper lunch bag. Unlike plastic, a paper bag allows them to "breathe" so they'll remain fresher longer. Stored properly, mushrooms keep for several days.

PREPARATION

To clean mushrooms, wipe with a damp cloth or rinse quickly in cool water. Be sure not to soak them since their porous nature absorbs liquid quickly.

Mushrooms are convenient to use because they require a minimum of preparation. Fresh mushrooms never need peeling thanks to their soft, thin skins.

ARITHMETIC

1 pound whole raw mushrooms = about 6 cups sliced, or 5 cups chopped.

1 pound sliced or chopped cooked mushrooms = about 2 cups.

SAUTÉED MUSHROOMS

Quickly sauté small whole, or sliced mushrooms in a little butter, margarine or olive oil. Season with your choice of chopped fresh or dried herbs, sliced green onions, lemon juice, hot pepper sauce, soy sauce or balsamic vinegar.

VERSATILE MUSHROOM KABOBS

Thread button mushrooms onto bamboo skewers with a selection of raw vegetable chunks. Serve as an appetizer or salad with a dip or two, or brush the kabobs with olive oil, season with salt and pepper and grill or a barbecue.

MUSHROOMS WITH PASTA AND PIZZA

Add sautéed mushrooms to prepared or homemade pasta sauces for superb flavor and "meaty" texture. With a generous amount of sautéed lowfat mushrooms on pizza, a little cheese can go a long way.

MENU

MUSHROOMS SANTA FÉ

Mesquite-Grilled Filet Mignon

Oven-Roasted Potato Wedges

Salad of Mixed Baby Greens

Bittersweet Chocolate Decadence Torte

MUSHROOMS SANTA FÉ

1 cup (4 ounces) shredded sharp Cheddar cheese
1/4 cup sour cream
3 tablespoons sliced green onions
2 1/2 tablespoons chopped cilantro **or** parsley
3 tablespoons canned diced, mild green chiles
1/4 cup butter **or** margarine
1 clove garlic, pressed
16 (8 ounces) 2-inch fresh mushroom caps
Grated fresh Parmesan cheese

In mixing bowl toss Cheddar cheese, sour cream, onions, cilantro and chiles to mix evenly; set aside. In small saucepan combine butter and garlic; warm over low heat to melt butter. Brush mushroom caps on both sides with garlic butter; place on baking sheet. Fill each cap with about 1 tablespoon cheese mixture. Sprinkle generously with Parmesan cheese. Broil until bubbly and golden, about 3 minutes. Serve immediately.

Makes 4 appetizer servings

LET
YOUR
LOVE
Mushroom!

Syllabus

FEDERAL ELECTION COMMISSION *v.* COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 00–191. Argued February 28, 2001—Decided June 25, 2001

In *Buckley* v. *Valeo*, 424 U. S. 1, 12–59, this Court held that the limitations on political campaign contributions in the Federal Election Campaign Act of 1971 were generally constitutional, but that the Act's limitations on election expenditures infringed political expression in violation of the First Amendment. Later cases have respected this line between contributing and spending. The distinction's simplicity is qualified, however, by the Act's provision for a functional, not formal, definition of "contribution," which includes "expenditures made by any person in cooperation, consultation, or concert, with . . . a candidate," 2 U. S. C. § 441a(a)(7)(B)(i). Thus, expenditures coordinated with a candidate are contributions under the Act. The Federal Election Commission (FEC) originally took the position that any expenditure by a political party in connection with a federal election was presumed to be coordinated with the party's candidate. See, *e. g.*, *Federal Election Comm'n* v. *Democratic Senatorial Campaign Comm.*, 454 U. S. 27, 28–29, n. 1. The FEC thus assumed that all expenditure limits imposed on political parties were, in essence, contribution limits and therefore constitutional. Such limits include § 441a(d)(3), which imposes spending limits on national and state political parties with respect to United States Senate elections. In *Colorado Republican Federal Campaign Comm.* v. *Federal Election Comm'n*, 518 U. S. 604 *(Colorado I)*, the spending limits in § 441a(d)(3) (referred to as the Party Expenditure Provision), were held unconstitutional as applied to the independent expenditures of the Colorado Republican Federal Campaign Committee (Party) in connection with a senatorial campaign. The principal opinion ruled the payments "independent," rather than coordinated, expenditures under this Court's cases because the Party spent the money before selecting its own senatorial candidate and without any arrangement with potential nominees. *Id.*, at 613–614. The principal opinion remanded the Party's broader claim that all limits on a party's congressional campaign expenditures are facially unconstitutional and thus un-

enforceable even as to spending coordinated with a candidate. *Id.*, at 623–626. On remand, the District Court held for the Party on that claim, and a divided Tenth Circuit panel affirmed.

Held: Because a party's coordinated expenditures, unlike expenditures truly independent, may be restricted to minimize circumvention of the Act's contribution limits, the Party's facial challenge is rejected. Pp. 440–465.

(a) Political expenditure limits deserve closer scrutiny than contribution restrictions, *e. g.*, *Buckley*, 424 U. S., at 14–23, because expenditure restraints generally curb more expressive and associational activity than contribution limits, *e. g.*, *id.*, at 19–23, and because unlimited contributions are more clearly linked to political corruption than other kinds of unlimited political spending, at least where the spending is not coordinated with a candidate or his campaign, *e. g.*, *id.*, at 47. Although the First Amendment line is easy to draw when it falls between independent expenditures by individuals or political action committees (PACs) without any candidate's approval and contributions in the form of cash gifts to candidates, see, *e. g.*, *id.*, at 19–23, facts speak less clearly once the independence of the spending cannot be taken for granted. Congress's functional treatment of coordinated expenditures by individuals and nonparty groups like contributions prevents attempts to circumvent the Act through coordinated expenditures amounting to disguised contributions. *Id.*, at 47. *Buckley*, in fact, enhanced the significance of this functional treatment by striking down independent expenditure limits on First Amendment grounds while upholding limitations on contributions (by individuals and nonparty groups), as defined to include coordinated expenditures. *Id.*, at 23–59. *Colorado I* addressed the FEC's effort to stretch the functional treatment one step further. Because *Buckley* had treated some coordinated expenditures like contributions and upheld their limitation, the FEC's argument went, the Party Expenditure Provision should stand as applied to all party election spending, see, *e. g.*, 518 U. S., at 619–623. Holding otherwise, the principal opinion found that, because "independent" party expenditures are no more likely to serve corruption than independent expenditures by anyone else, there was no justification for subjecting party election spending across the board to the kinds of limits previously invalidated when applied to individuals and nonparty groups. See *id.*, at 616. But that still left the question whether the First Amendment allows coordinated election expenditures by parties to be treated functionally as contributions, the way coordinated expenditures by other entities are treated. The issue in this case is, accordingly, whether a party is in a different position from other political speakers, giving it a claim to de-

mand a higher standard of scrutiny before its coordinated spending can be limited. Pp. 440–445.

(b) The Party's argument that its coordinated spending, like its independent spending, should be left free from restriction under the *Buckley* line of cases boils down to this: because a party's most important speech is aimed at electing candidates and is itself expressed through those candidates, any limit on party support for a candidate imposes a unique First Amendment burden. Limitation of any party expenditure coordinated with a candidate, the Party contends, is therefore a serious, rather than incidental, imposition on the party's speech and associative purpose, which justifies a stricter level of scrutiny than has been applied to analogous limits on individuals and nonparty groups. But whatever level of scrutiny is applied to such a limit, the Party argues, the burden on a party reflects a fatal mismatch between the effects of limiting coordinated party expenditures and the prevention of corruption or its appearance. In contrast, the Government's argument for characterizing coordinated spending like contributions goes back to *Buckley*, which, in effect, subjected limits on coordinated expenditures by individuals and nonparty groups to the same scrutiny it applied to limits on their cash contributions. The standard of scrutiny requires the limit to be closely drawn to match a sufficiently important interest, though the limit's dollar amount need not be fine tuned. See, *e. g.*, *Buckley*, *supra*, at 25, 30. The Government develops this rationale a step further here, arguing that a party's coordinated spending should be limited not only because it is like a party contribution, but because giving a party the right to make unlimited coordinated expenditures would induce those wishing to support a nominee to contribute to the party in order to finance coordinated spending for that candidate, thereby increasing circumvention and bypassing the limits *Buckley* upheld. Pp. 445–447.

(c) Although each of the competing positions is plausible at first blush, evaluation of the arguments prompts rejection of the Party's claim to suffer a burden unique in any way that should make a categorical difference under the First Amendment. And the Government's contentions are ultimately borne out by evidence, entitling it to prevail in its characterization of party coordinated spending as the functional equivalent of contributions. Pp. 447–460.

(1) The Party's argument that unrestricted coordinated spending is essential to a party's nature because of its unique relationship with candidates has been rendered implausible by nearly 30 years' history under the Act. Since 1974, a party's coordinated spending in a given race has been limited by the provision challenged here (or its predecessor). It was not until the 1996 *Colorado I* decision that any spending was allowed above that amount, and since then only independent

spending has been unlimited. Thus, the Party's claim that coordinated spending beyond the Act's limit is essential to its very function as a party amounts implicitly to saying that for almost three decades political parties have not been quite functional or have been functioning in systematic violation of the law. The Court cannot accept either implication. Pp. 449–450.

(2) There is a different weakness in the seemingly unexceptionable premise that parties are organized for the purpose of electing candidates, so that imposing on the way parties serve that function is uniquely burdensome. The fault here is a refusal to see how the power of money actually works in the political structure. Looking directly at a party's function in getting and spending money, it would ignore reality to think that the party role is adequately described by speaking generally of electing particular candidates. Parties are necessarily the instruments of some contributors, such as PACs, whose object is not to support the party's message or to elect party candidates, but rather to support a specific candidate for the sake of a position on one, narrow issue, or even to support any candidate who will be obliged to contributors. Parties thus perform functions more complex than simply electing their candidates: they act as agents for spending on behalf of those who seek to produce obligated officeholders. It is this party role, which functionally unites parties with other self-interested political actors, that the Party Expenditure Provision targets. Pp. 450–452.

(3) The Court agrees insofar as the Party suggests that its strong working relationship with candidates and its unique ability to speak in coordination with them should be taken into account in the First Amendment analysis. It is the accepted understanding that a party combines its members' power to speak by aggregating their contributions and broadcasting its messages more widely than its individual contributors generally could afford to do, and it marshals this power with greater sophistication than individuals generally could, using such mechanisms as speech coordinated with a candidate. Cf. *Colorado I*, 518 U. S., at 637. It does not, however, follow from a party's efficiency in getting large sums and spending intelligently that limits on a party's coordinated spending should be scrutinized under an unusually high standard. In fact, any argument from sophistication and power would cut both ways. On the one hand, one can seek the benefit of stricter scrutiny of a law capping party coordinated spending by emphasizing the heavy burden imposed by limiting the most effective mechanism of sophisticated spending. And yet it is exactly this efficiency culminating in coordinated spending that (on the Government's view) places a party in a position to be used to circumvent contribution limits that apply to individuals and PACs, and thereby to exacerbate the threat of

corruption and apparent corruption that those contribution limits are aimed at reducing. Pp. 453–454.

(4) The preceding question assumes that parties enjoy a power and experience that sets them apart from other political spenders. But in fact the assumption is too crude. Like a party, rich individual donors, media executives, and PACs have the means to speak loudly and the capacity to work in tandem with a candidate. Yet all of them are subject to the coordinated spending limits upheld in *Buckley*, 424 U. S., at 46–47. A party is also like some of these political actors in its right under *Colorado I* to spend money in support of a candidate without legal limit so long as it spends independently. A party is not, therefore, in a unique position, but is in the same position as some individuals and PACs. Pp. 454–455.

(5) Because the Party's arguments do not pan out, the Court applies to a party's coordinated spending limitation the same scrutiny it has applied to the other political actors, that is, scrutiny appropriate for a contribution limit, enquiring whether the restriction is "closely drawn" to match the "sufficiently important" government interest in combating political corruption. *E. g.*, *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 387–388. Pp. 455–456.

(6) Under that standard, adequate evidentiary grounds exist to sustain the coordinated spending limit for parties. Substantial evidence demonstrates how candidates, donors, and parties test the current law's limits, and it shows beyond serious doubt how those contribution limits would be eroded if inducement to circumvent them were enhanced by declaring parties' coordinated spending wide open. Under the Act, a donor is limited to $2,000 in contributions to one candidate in a given election cycle. The same donor may give as much as another $20,000 each year to a national party committee supporting the candidate. The evidence shows that what a realist would expect to occur has occurred. Donors give to the party with the tacit understanding that the favored candidate will benefit. Testimony shows that, although the understanding between donor and party may involve no definite commitment and may be tacit on the donor's part, the frequency of the practice and the volume of money involved has required parties to adopt tallying procedures to connect donors to candidates. If suddenly every dollar of spending could be coordinated with the candidate, the inducement to circumvent would almost certainly intensify. Pp. 457–460.

(d) The Party's attempts to minimize the threat of corruption by circumvention are unavailing. Its claim that most contributions to parties are small, with negligible corrupting momentum to be carried through the party conduit, is unpersuasive given the evidence that, even under present law, substantial donations turn the parties into matchmakers

whose special meetings and receptions give donors the chance to get their points across to the candidates. The fact that incumbent candidates give more excess campaign funds to parties than parties spend on coordinated expenditures does not defuse concern over circumvention; if party contributions were not used as a funnel from donors to candidates, there would be no reason for the tallying system described by the witnesses. Finally, the Court rejects the Party's claim that, even if there is a circumvention threat, the First Amendment demands a response better tailored to that threat than a limitation on coordinated spending. First, the Party's suggestion that better crafted safeguards are already in place in § 441a(a)(8)—which provides that contributions that are earmarked or otherwise directed through an intermediary to a candidate are treated as contributions to the candidate—ignores the practical difficulty of identifying and directly combating circumvention when contributions go into a general party treasury and candidate-fundraisers are rewarded with something less obvious than dollar-for-dollar pass-throughs. Second, although the Party's call for replacing limits on parties' coordinated expenditures with limits on contributions to parties is based in part on reasoning in *Buckley, supra,* at 44, and *Colorado I, supra,* at 617, those cases ultimately turned on the understanding that the expenditures at issue were independent and therefore functionally true expenditures, whereas, here, just the opposite is true. Pp. 461–465.

213 F. 3d 1221, reversed.

SOUTER, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed a dissenting opinion, in which SCALIA and KENNEDY, JJ., joined, and in which REHNQUIST, C. J., joined as to Part II, *post,* p. 465.

Acting Solicitor General Underwood argued the cause for petitioner. With her on the briefs were former *Solicitor General Waxman, Malcolm L. Stewart, Lawrence M. Noble, Richard B. Bader,* and *David Kolker.*

Jan Witold Baran argued the cause for respondent. With him on the brief were *Thomas W. Kirby* and *Carol A. Laham.**

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*Briefs of *amici curiae* urging reversal were filed for the State of Missouri et al. by *Jeremiah W. (Jay) Nixon,* Attorney General of Missouri, and *James R. Layton,* State Solicitor, joined by the Attorneys General for their respective States as follows: *Ken Salazar* of Colorado, *Earl I. Anzai*

JUSTICE SOUTER delivered the opinion of the Court.

In *Colorado Republican Federal Campaign Comm.* v. *Federal Election Comm'n*, 518 U. S. 604 (1996) *(Colorado I)*, we held that spending limits set by the Federal Election Campaign Act were unconstitutional as applied to the Colorado Republican Party's independent expenditures in connection with a senatorial campaign. We remanded for consideration of the party's claim that all limits on expenditures by a political party in connection with congressional campaigns are facially unconstitutional and thus unenforceable even as to spending coordinated with a candidate. Today we reject that facial challenge to the limits on parties' coordinated expenditures.

I

We first examined the Federal Election Campaign Act of 1971 in *Buckley* v. *Valeo*, 424 U. S. 1 (1976) *(per curiam)*, where we held that the Act's limitations on contributions to a candidate's election campaign were generally constitutional, but that limitations on election expenditures were not. *Id.*, at 12–59. Later cases have respected this line between contributing and spending. See, *e. g.*, *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 386–388 (2000); *Colorado I*, *supra*, at 610, 614–615; *Federal Election*

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of Hawaii, *Joseph P. Mazurek* of Montana, *Eliot Spitzer* of New York, *W. A. Drew Edmondson* of Oklahoma, and *William H. Sorrell* of Vermont; for Common Cause et al. by *Roger M. Witten*, *Daniel H. Squire*, *Donald J. Simon*, and *Fred Wertheimer*; for the National Voting Rights Institute by *David A. Wilson*, *John C. Bonifaz*, *Brenda Wright*, and *Gregory G. Luke*; for Senator John F. Reed et al. by *Donald B. Verrilli, Jr.*, and *Deanne E. Maynard*; and for Paul Allen Beck et al. by *Burt Neuborne*.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Mark J. Lopez*, *Steven R. Shapiro*, and *Joel M. Gora*; for the California Republican Party by *Charles H. Bell, Jr.*; for the Missouri Republican Party by *D. Bruce La Pierre* and *W. Bevis Schock*; and for the National Republican Congressional Committee by *Benjamin L. Ginsberg*.

Comm'n v. *Massachusetts Citizens for Life, Inc.*, 479 U. S. 238, 259–260 (1986).

The simplicity of the distinction is qualified, however, by the Act's provision for a functional, not formal, definition of "contribution," which includes "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents," 2 U. S. C. §441a(a)(7)(B)(i).[1] Expenditures coordinated with a candidate, that is, are contributions under the Act.

The Federal Election Commission (FEC or Commission) originally took the position that any expenditure by a political party in connection with a particular election for federal office was presumed to be coordinated with the party's candidate. See *Federal Election Comm'n* v. *Democratic Senatorial Campaign Comm.*, 454 U. S. 27, 28–29, n. 1 (1981); Brief for Petitioner 6–7. The Commission thus operated on the assumption that all expenditure limits imposed on political parties were, in essence, contribution limits and therefore constitutional. Brief for Respondent in *Colorado I*, O. T. 1995, No. 95–489, pp. 28–30. Such limits include 2 U. S. C. §441a(d)(3), which provides that in elections for the United States Senate, each national or state party committee[2] is

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[1] "Contribution" is otherwise defined as "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office"; or "the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose." 2 U. S. C. §431(8).

The Act defines "expenditure" as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." §431(9)(A)(i). A "written contract, promise, or agreement to make an expenditure" also counts as an expenditure. §431(9)(A)(ii).

[2] A political party's "national committee" is the "organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the national level, as determined by

limited to spending the greater of $20,000 (adjusted for inflation, § 441a(c)) or two cents multiplied by the voting age population of the State in which the election is held, § 441a(d)(3)(A).[3]

Colorado I was an as-applied challenge to § 441a(d)(3) (which we spoke of as the Party Expenditure Provision), occasioned by the Commission's enforcement action against the Colorado Republican Federal Campaign Committee (Party) for exceeding the campaign spending limit through its payments for radio advertisements attacking Democratic Congressman and senatorial candidate Timothy Wirth. 518 U. S., at 612–613. The Party defended in part with the claim that the party expenditure limitations violated the First Amendment, and the principal opinion in *Colorado I* agreed that the limitations were unconstitutional as applied to the advertising expenditures at issue. Unlike the Commission, the Members of the Court who joined the principal opinion thought the payments were "independent expenditures" as that term had been used in our prior cases, owing to the facts that the Party spent the money before selecting its own senatorial candidate and without any arrangement with potential nominees. *Id.*, at 613–614 (opinion of BREYER, J.).

The Party's broader claim remained: that although prior decisions of this Court had upheld the constitutionality of limits on coordinated expenditures by political speakers

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the [Federal Election] Commission." § 431(14). A "state committee" fills the same role at the state level. § 431(15).

[3] The same limits apply to campaigns for House of Representatives from States entitled to only one Representative. § 441a(d)(3)(A). For other States, the limit on party expenditures in connection with House campaigns is $10,000 preadjustment. § 441a(d)(3)(B). As adjusted for inflation, the 2000 Senate limits ranged from $67,560 to $1,636,438; House limits ranged from $33,780 to $67,560. 26 FEC Record 14–15 (Mar. 2000).

The FEC reads the Act to permit parties to make campaign contributions within the otherwise-applicable contribution limits, in addition to the expenditures permitted by § 441a(d). See n. 16, *infra*.

other than parties, the congressional campaign expenditure limitations on parties themselves are facially unconstitutional, and so are incapable of reaching party spending even when coordinated with a candidate. *Id.*, at 623–626.[4] We remanded that facial challenge, which had not been fully briefed or considered below. *Ibid.* On remand the District Court held for the Party, 41 F. Supp. 2d 1197 (1999), and a divided panel of the Court of Appeals for the Tenth Circuit affirmed, 213 F. 3d 1221 (2000).[5] We granted certiorari to resolve the question left open by *Colorado I*, see 531 U. S. 923 (2000), and we now reverse.

II

Spending for political ends and contributing to political candidates both fall within the First Amendment's protection of speech and political association. *Buckley*, 424 U. S., at 14–23. But ever since we first reviewed the 1971 Act, we have understood that limits on political expenditures deserve closer scrutiny than restrictions on political contributions. *Ibid.*; see also, *e. g.*, *Shrink Missouri*, 528 U. S., at 386–388; *Colorado I*, *supra*, at 610, 614–615; *Massachusetts Citizens for Life*, *supra*, at 259–260. Restraints on expenditures generally curb more expressive and associational activity than limits on contributions do. *Shrink Missouri*, *supra*, at 386–388; *Colorado I*, *supra*, at 615; *Buckley*, *supra*, at 19–23. A further reason for the distinction is that limits on contribu-

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[4] The limits applicable to Presidential campaigns were not at issue in *Colorado I*, 518 U. S. 604, 610–611 (1996), and are not at issue here, Brief for Respondent 49, n. 30.

[5] Along with its constitutional claim, the Party argued to the District Court that the Party Expenditure Provision's application to independent expenditures was not severable from the other possible applications of the provision, a nonconstitutional basis for resolving the case that the *Colorado I* principal opinion suggested should be explored on remand. *Colorado I*, *supra*, at 625–626. The District Court rejected the nonseverability argument, 41 F. Supp. 2d, at 1207, and the Party did not renew it on appeal, 213 F. 3d, at 1225, n. 3.

tions are more clearly justified by a link to political corruption than limits on other kinds of unlimited political spending are (corruption being understood not only as *quid pro quo* agreements, but also as undue influence on an officeholder's judgment, and the appearance of such influence, *Shrink Missouri*, *supra*, at 388–389). At least this is so where the spending is not coordinated with a candidate or his campaign. *Colorado I*, *supra*, at 615; *Buckley*, 424 U. S., at 47. In *Buckley* we said that:

> "[u]nlike contributions, . . . independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Ibid.*

Given these differences, we have routinely struck down limitations on independent expenditures by candidates, other individuals, and groups, see *Federal Election Comm'n* v. *National Conservative Political Action Comm.*, 470 U. S. 480, 490–501 (1985) (political action committees); *Buckley*, *supra*, at 39–58 (individuals, groups, candidates, and campaigns),[6] while repeatedly upholding contribution limits, see *Shrink Missouri*, *supra* (contributions by political action

[6] The expenditure limits invalidated in *Buckley* applied to candidates and their campaigns, and to "persons." See 424 U. S., at 39–40, 51, 54, 58. "Person" was defined as "an individual, partnership, committee, association, corporation, or any other organization or group of persons." 18 U. S. C. § 591(g) (1970 ed., Supp. IV); see also *Buckley*, 424 U. S., at 144–235 (appendix reprinting then-current Act). Although this language is broad enough to cover political parties, *id.*, at 19, and n. 19, 39, parties with a candidate on the ballot were covered instead by the special Party Expenditure Provision, which was not challenged on First Amendment grounds, *id.*, at 58, n. 66.

committees); *California Medical Assn.* v. *Federal Election Comm'n*, 453 U. S. 182, 193–199 (1981) (contributions by individuals and associations); *Buckley, supra*, at 23–36 (contributions by individuals, groups, and political committees).[7]

The First Amendment line between spending and donating is easy to draw when it falls between independent expenditures by individuals or political action committees (PACs) without any candidate's approval (or wink or nod), and contributions in the form of cash gifts to candidates. See, *e. g.*, *Shrink Missouri, supra*, at 386–388; *Buckley, supra*, at 19–23.[8] But facts speak less clearly once the independence of

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[7] The contribution limits at issue in *Buckley* applied to "persons" ("person" again defined as "an individual, partnership, committee, association, corporation or any other organization or group of persons," *id.*, at 23). Certain groups (referred to under current law as "multicandidate political committees") that registered with the FEC and met other qualifications, including making contributions to five or more candidates for federal office, were subject to a higher limit. *Id.*, at 35.

The current contribution limits appear in 2 U. S. C. § 441a(a). They provide that "persons" (still broadly defined, see § 431(11)) may contribute no more than $1,000 to a candidate "with respect to any election for Federal office," $5,000 to any political committee in any year, and $20,000 to the national committees of a political party in any year. § 441a(a)(1). Individuals are limited to a yearly contribution total of $25,000. § 441a(a)(3). "[M]ulticandidate political committees" are limited to a $5,000 contribution to a candidate "with respect to any election," $5,000 to any political committee in any year, and $15,000 to the national committees of a political party in any year. § 441a(a)(2). Unlike the party expenditure limits, these contribution limits are not adjusted for inflation.

[8] The Party does not challenge the constitutionality of limits on cash contributions from parties to candidates, Brief for Respondent 49, n. 31, which, on the FEC's reading of the Act, are imposed on parties by the generally applicable contribution limits of 2 U. S. C. § 441a(a), see n. 16, *infra*. And the Party, unlike JUSTICE THOMAS, *post*, at 465 (dissenting opinion), does not call for the overruling of *Buckley*. Nor does the FEC ask us to revisit *Buckley*'s general approach to expenditure limits, although some have argued that such limits could be justified in light of post-*Buckley* developments in campaign finance, see, *e. g.*, Blasi, Free Speech and the Widening Gyre of Fundraising, 94 Colum. L. Rev. 1281 (1994); cf. *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 409

the spending cannot be taken for granted, and money spent by an individual or PAC according to an arrangement with a candidate is therefore harder to classify. As already seen, Congress drew a functional, not a formal, line between contributions and expenditures when it provided that coordinated expenditures by individuals and nonparty groups are subject to the Act's contribution limits, 2 U. S. C. § 441a(a)(7)(B)(i); *Colorado I*, 518 U. S., at 611. In *Buckley*, the Court acknowledged Congress's functional classification, 424 U. S., at 46–47, and n. 53, and observed that treating coordinated expenditures as contributions "prevent[s] attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions," *id.*, at 47. *Buckley*, in fact, enhanced the significance of this functional treatment by striking down independent expenditure limits on First Amendment grounds while upholding limitations on contributions (by individuals and nonparty groups), as defined to include coordinated expenditures, *id.*, at 23–59.[9]

Colorado I addressed the FEC's effort to stretch the functional treatment of coordinated expenditures further than the plain application of the statutory definition. As we said, the FEC argued that parties and candidates are coupled so closely that all of a party's expenditures on an election campaign are coordinated with its candidate; because *Buckley* had treated some coordinated expenditures like contribu-

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(2000) (KENNEDY, J., dissenting) ("I would leave open the possibility that Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising"); *id.*, at 405 (BREYER, J., concurring) ("Suppose *Buckley* denies the political branches sufficient leeway to enact comprehensive solutions to the problems posed by campaign finance. If so, like JUSTICE KENNEDY, I believe the Constitution would require us to reconsider *Buckley*").

[9] As noted, n. 6, *supra*, the Party Expenditure Provision itself was not challenged on First Amendment grounds in *Buckley*, *supra*, at 58, n. 66.

tions and upheld their limitation, the argument went, the Party Expenditure Provision should stand as applied to all party election spending. See Brief for Respondent in *Colorado I*, O. T. 1995, No. 95–489, at 28–30; see also *Colorado I*, *supra*, at 619–623. *Colorado I* held otherwise, however, the principal opinion's view being that some party expenditures could be seen as "independent" for constitutional purposes. 518 U. S., at 614. The principal opinion found no reason to see these expenditures as more likely to serve or be seen as instruments of corruption than independent expenditures by anyone else. So there was no justification for subjecting party election spending across the board to the kinds of limits previously invalidated when applied to individuals and nonparty groups. The principal opinion observed that "[t]he independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees." *Id.*, at 616. Since the FEC did not advance any other convincing reason for refusing to draw the independent-coordinated line accepted since *Buckley*, see *National Conservative Political Action Comm.*, 470 U. S., at 497–498; *Buckley*, *supra*, at 46–47, that was the end of the case so far as it concerned independent spending. *Colorado I*, *supra*, at 617–623.

But that still left the question whether the First Amendment allows coordinated election expenditures by parties to be treated functionally as contributions, the way coordinated expenditures by other entities are treated. *Colorado I* found no justification for placing parties at a disadvantage when spending independently; but was there a case for leaving them entirely free to coordinate unlimited spending with candidates when others could not? The principal opinion in *Colorado I* noted that coordinated expenditures "share some of the constitutionally relevant features of independent expenditures." 518 U. S., at 624. But it also observed that "many [party coordinated expenditures] are . . . virtually in-

distinguishable from simple contributions." *Ibid.* Coordinated spending by a party, in other words, covers a spectrum of activity, as does coordinated spending by other political actors. The issue in this case is, accordingly, whether a party is otherwise in a different position from other political speakers, giving it a claim to demand a generally higher standard of scrutiny before its coordinated spending can be limited. The issue is posed by two questions: does limiting coordinated spending impose a unique burden on parties, and is there reason to think that coordinated spending by a party would raise the risk of corruption posed when others spend in coordination with a candidate? The issue is best viewed through the positions developed by the Party and the Government in this case.

III

The Party's argument that its coordinated spending, like its independent spending, should be left free from restriction under the *Buckley* line of cases boils down to this: because a party's most important speech is aimed at electing candidates and is itself expressed through those candidates, any limit on party support for a candidate imposes a unique First Amendment burden. See Brief for Respondent 26–31. The point of organizing a party, the argument goes, is to run a successful candidate who shares the party's policy goals. *Id.*, at 26. Therefore, while a campaign contribution is only one of several ways that individuals and nonparty groups speak and associate politically, see *Shrink Missouri*, 528 U. S., at 386–387; *Buckley*, *supra*, at 20–22, financial support of candidates is essential to the nature of political parties as we know them. And coordination with a candidate is a party's natural way of operating, not merely an option that can easily be avoided. Brief for Respondent 26. Limitation of any party expenditure coordinated with a candidate, the Party contends, is therefore a serious, rather than incidental, imposition on the party's speech and associative purpose, and that justifies a stricter level of scrutiny than we have applied

to analogous limits on individuals and nonparty groups. But whatever level of scrutiny is applied, the Party goes on to argue, the burden on a party reflects a fatal mismatch between the effects of limiting coordinated party expenditures and the prevention of corruption or the appearance of it. Brief for Respondent 20–22, 25–32; see also 213 F. 3d, at 1227.

The Government's argument for treating coordinated spending like contributions goes back to *Buckley*. There, the rationale for endorsing Congress's equation of coordinated expenditures and contributions was that the equation "prevent[s] attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." 424 U. S., at 47. The idea was that coordinated expenditures are as useful to the candidate as cash, and that such "disguised contributions" might be given "as a *quid pro quo* for improper commitments from the candidate" (in contrast to independent expenditures, which are poor sources of leverage for a spender because they might be duplicative or counterproductive from a candidate's point of view). *Ibid.* In effect, therefore, *Buckley* subjected limits on coordinated expenditures by individuals and nonparty groups to the same scrutiny it applied to limits on their cash contributions. The standard of scrutiny requires the limit to be "'closely drawn' to match a 'sufficiently important interest,' . . . though the dollar amount of the limit need not be 'fine tun[ed],'" *Shrink Missouri*, *supra*, at 387–388 (quoting *Buckley*, *supra*, at 25, 30).

The Government develops this rationale a step further in applying it here. Coordinated spending by a party should be limited not only because it is like a party contribution, but for a further reason. A party's right to make unlimited expenditures coordinated with a candidate would induce individual and other nonparty contributors to give to the party in order to finance coordinated spending for a favored candidate beyond the contribution limits binding on them. The

Government points out that a degree of circumvention is occurring under present law (which allows unlimited independent spending and some coordinated spending). Individuals and nonparty groups who have reached the limit of direct contributions to a candidate give to a party with the understanding that the contribution to the party will produce increased party spending for the candidate's benefit. The Government argues that if coordinated spending were unlimited, circumvention would increase: because coordinated spending is as effective as direct contributions in supporting a candidate, an increased opportunity for coordinated spending would aggravate the use of a party to funnel money to a candidate from individuals and nonparty groups, who would thus bypass the contribution limits that *Buckley* upheld.

IV

Each of the competing positions is plausible at first blush. Our evaluation of the arguments, however, leads us to reject the Party's claim to suffer a burden unique in any way that should make a categorical difference under the First Amendment. On the other side, the Government's contentions are ultimately borne out by evidence, entitling it to prevail in its characterization of party coordinated spending as the functional equivalent of contributions.

A

In assessing the Party's argument, we start with a word about what the Party is not saying. First, we do not understand the Party to be arguing that the line between independent and coordinated expenditures is conceptually unsound when applied to a political party instead of an individual or other association. See, *e. g.*, Brief for Respondent 29 (describing "independent party speech"). Indeed, the good sense of recognizing the distinction between independence and coordination was implicit in the principal opinion in *Colorado I*, which did not accept the notion of a "metaphysi-

cal identity" between party and candidate, 518 U. S., at 622–623, but rather decided that some of a party's expenditures could be understood as being independent and therefore immune to limitation just as an individual's independent expenditure would be, *id.*, at 619–623.

Second, we do not understand the Party to be arguing that associations in general or political parties in particular may claim a variety of First Amendment protection that is different in kind from the speech and associational rights of their members.[10] The Party's point, rather, is best understood as a factual one: coordinated spending is essential to parties because "a party and its candidate are joined at the hip," Brief for Respondent 31, owing to the very conception of the party as an organization formed to elect candidates. Parties, thus formed, have an especially strong working relationship with their candidates, *id.*, at 26, and the speech this special relationship facilitates is much more effective than independent speech, *id.*, at 29.

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[10] We have repeatedly held that political parties and other associations derive rights from their members. *E. g., Norman* v. *Reed*, 502 U. S. 279, 288 (1992); *Tashjian* v. *Republican Party of Conn.*, 479 U. S. 208, 214–215 (1986); *Roberts* v. *United States Jaycees*, 468 U. S. 609, 622–623 (1984); *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 459–460 (1958); *Sweezy* v. *New Hampshire*, 354 U. S. 234, 250 (1957). While some commentators have assumed that associations' rights are also limited to the rights of the individuals who belong to them, *e. g.*, Supreme Court, 1996 Term, Leading Cases, Associational Rights of Political Parties, 111 Harv. L. Rev. 197, 315, n. 50 (1997), that view has been subject to debate, see, *e. g.*, Gottlieb, Fleshing Out the Right of Association, 49 Albany L. Rev. 825, 826, 836–837 (1985); see generally Issacharoff, Private Parties with Public Purposes, 101 Colum. L. Rev. 274 (2001). There is some language in our cases supporting the position that parties' rights are more than the sum of their members' rights, *e. g., California Democratic Party* v. *Jones*, 530 U. S. 567, 575 (2000) (referring to the "special place" the First Amendment reserves for the process by which a political party selects a standard bearer); *Timmons* v. *Twin Cities Area New Party*, 520 U. S. 351, 373 (1997) (STEVENS, J., dissenting), but we have never settled upon the nature of any such difference and have no reason to do so here.

There are two basic arguments here. The first turns on the relationship of a party to a candidate: a coordinated relationship between them so defines a party that it cannot function as such without coordinated spending, the object of which is a candidate's election. We think political history and political reality belie this argument. The second argument turns on the nature of a party as uniquely able to spend in ways that promote candidate success. We think that this argument is a double-edged sword, and one hardly limited to political parties.

1

The assertion that the party is so joined at the hip to candidates that most of its spending must necessarily be coordinated spending is a statement at odds with the history of nearly 30 years under the Act. It is well to remember that ever since the Act was amended in 1974, coordinated spending by a party committee in a given race has been limited by the provision challenged here (or its predecessor). See 18 U. S. C. § 608(f) (1970 ed., Supp. IV); see also *Buckley*, 424 U. S., at 194 (reprinting then-effective Party Expenditure Provision). It was not until 1996 and the decision in *Colorado I* that any spending was allowed above that amount, and since then only independent spending has been unlimited. As a consequence, the Party's claim that coordinated spending beyond the limit imposed by the Act is essential to its very function as a party amounts implicitly to saying that for almost three decades political parties have not been functional or have been functioning in systematic violation of the law. The Party, of course, does not in terms make either statement, and we cannot accept either implication. There is no question about the closeness of candidates to parties and no doubt that the Act affected parties' roles and their exercise of power. But the political scientists who have weighed in on this litigation observe that "there is little evidence to suggest that coordinated party spending limits adopted by Congress have frustrated the ability of political

parties to exercise their First Amendment rights to support their candidates," and that "[i]n reality, political parties are dominant players, second only to the candidates themselves, in federal elections." Brief for Paul Allen Beck et al. as *Amici Curiae* 5–6. For the Party to claim after all these years of strictly limited coordinated spending that unlimited coordinated spending is essential to the nature and functioning of parties is in reality to assert just that "metaphysical identity," 518 U. S., at 623, between free-spending party and candidate that we could not accept in *Colorado I*.[11]

2

There is a different weakness in the seemingly unexceptionable premise that parties are organized for the purpose of electing candidates, Brief for Respondent 26 ("Parties exist precisely to elect candidates that share the goals of their party"), so that imposing on the way parties serve that function is uniquely burdensome. The fault here is not so much metaphysics as myopia, a refusal to see how the power of money actually works in the political structure.

When we look directly at a party's function in getting and spending money, it would ignore reality to think that the party role is adequately described by speaking generally of

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[11] To say that history and common sense make us skeptical that parties are uniquely incapacitated by the challenged limitations is not to deny that limiting parties' coordinated expenditures while permitting unlimited independent expenditures prompts parties to structure their spending in a way that they would not otherwise choose. See *post*, at 470. And we acknowledge below, *infra*, at 453–455, that limiting coordinated expenditures imposes some burden on parties' associational efficiency. But the very evidence cited by the dissent suggests that it is nonetheless possible for parties, like individuals and nonparty groups, to speak independently. *E. g.*, App. 218 (statement of Professor Anthony Corrado) ("[I]t is likely that parties will allocate an increasing amount of money to independent expenditure efforts in the future"); *id.*, at 159 (affidavit of Donald K. Bain, Chairman of the Colorado Republican Federal Campaign Committee) (describing ability to make independent expenditures as "welcome").

electing particular candidates. The money parties spend comes from contributors with their own personal interests. PACs, for example, are frequent party contributors who (according to one of the Party's own experts) "do not pursue the same objectives in electoral politics" that parties do. App. 180 (statement of Professor Anthony Corrado). PACs "are most concerned with advancing their narrow interest[s]" and therefore "provide support to candidates who share their views, regardless of party affiliation." *Ibid.* In fact, many PACs naturally express their narrow interests by contributing to both parties during the same electoral cycle,[12] and sometimes even directly to two competing candidates in the same election, L. Sabato, PAC Power, Inside the World of Political Action Committees 88 (1984).[13] Parties

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[12] As former Senator Paul Simon explained, "I believe people contribute to party committees on both sides of the aisle for the same reason that Federal Express does, because they want favors. There is an expectation that giving to party committees helps you legislatively." *Id.*, at 270. See also *id.*, at 269–270 (recounting debate over a bill favored by Federal Express during which a colleague exclaimed "we've got to pay attention to who is buttering our bread").

The FEC's public records confirm that Federal Express's PAC (along with many others) contributed to both major parties in recent elections. See, *e. g.*, FEC Disclosure Report, Search Results for Federal Express Political Action Committee (June 20, 2001), http://herndon1.sdrdc.com/cgi-bin/com_supopp/C00068692; FEC Disclosure Report, Search Results for Association of Trial Lawyers of America Political Action Committee (June 20, 2001), http://herndon1.sdrdc.com/cgi-bin/com_supopp/C00024521; FEC Disclosure Report, Search Results for Philip Morris Companies, Inc., Political Action Committee (June 20, 2001), http://herndon1.sdrdc.com/cgi-bin/com_supopp/C00089136; FEC Disclosure Report, Search Results for American Medical Association Political Action Committee (June 20, 2001), http://herndon1.sdrdc.com/cgi-bin/com_supopp/C00000422; FEC Disclosure Report, Search Results for Letter Carriers Political Action Fund (June 20, 2001), http://herndon1.sdrdc.com/cgi-bin/com_supopp/C00023580.

[13] For example, the PACs associated with AOL Time Warner Inc. and Philip Morris Companies, Inc., both made contributions to the competing 2000 Senate campaigns of George Allen and Charles Robb. See

are thus necessarily the instruments of some contributors whose object is not to support the party's message or to elect party candidates across the board, but rather to support a specific candidate for the sake of a position on one narrow issue, or even to support any candidate who will be obliged to the contributors.[14]

Parties thus perform functions more complex than simply electing candidates; whether they like it or not, they act as agents for spending on behalf of those who seek to produce obligated officeholders. It is this party role, which functionally unites parties with other self-interested political actors, that the Party Expenditure Provision targets. This party role, accordingly, provides good reason to view limits on coordinated spending by parties through the same lens applied to such spending by donors, like PACs, that can use parties as conduits for contributions meant to place candidates under obligation.

FEC Disclosure Report, Search Results for AOL Time Warner Inc. Political Action Committee (June 20, 2001), http://herndon1.sdrdc.com/cgi-bin/com_supopp/C00339291; FEC Disclosure Report, Search Results for Philip Morris Companies, Inc., Political Action Committee, *supra*.

[14] We have long recognized Congress's concern with this reality of political life. For example, in *United States* v. *Automobile Workers*, 352 U. S. 567 (1957), Justice Frankfurter recounted Senator Robinson's explanation for the Federal Corrupt Practices Act's restriction of corporate campaign contributions:

"'We all know . . . that one of the great political evils of the time is the apparent hold on political parties which business interests and certain organizations seek and sometimes obtain by reason of liberal campaign contributions. Many believe that when an individual or association of individuals makes large contributions for the purpose of aiding candidates of political parties in winning the elections, they expect, and sometimes demand, and occasionally, at least, receive, consideration by the beneficiaries of their contributions which not infrequently is harmful to the general public interest.'" *Id.*, at 576 (quoting 65 Cong. Rec. 9507–9508 (1924)).

Insofar as the Party suggests that its strong working relationship with candidates and its unique ability to speak in coordination with them should be taken into account in the First Amendment analysis, we agree. It is the accepted understanding that a party combines its members' power to speak by aggregating contributions and broadcasting messages more widely than individual contributors generally could afford to do, and the party marshals this power with greater sophistication than individuals generally could, using such mechanisms as speech coordinated with a candidate. In other words, the party is efficient in generating large sums to spend and in pinpointing effective ways to spend them. Cf. *Colorado I*, 518 U. S., at 637 (THOMAS, J., concurring in judgment and dissenting in part) ("Political associations allow citizens to pool their resources and make their advocacy more effective").

It does not, however, follow from a party's efficiency in getting large sums and spending intelligently that limits on a party's coordinated spending should be scrutinized under an unusually high standard, and in fact any argument from sophistication and power would cut both ways. On the one hand, one can seek the benefit of stricter scrutiny of a law capping party coordinated spending by emphasizing the heavy burden imposed by limiting the most effective mechanism of sophisticated spending. And yet it is exactly this efficiency culminating in coordinated spending that (on the Government's view) places a party in a position to be used to circumvent contribution limits that apply to individuals and PACs, and thereby to exacerbate the threat of corruption and apparent corruption that those contribution limits are aimed at reducing. As a consequence, what the Party calls an unusual burden imposed by regulating its spending is not a simple premise for arguing for tighter scrutiny of limits on a party; it is the premise for a question pointing in

the opposite direction. If the coordinated spending of other, less efficient and perhaps less practiced political actors can be limited consistently with the Constitution, why would the Constitution forbid regulation aimed at a party whose very efficiency in channeling benefits to candidates threatens to undermine the contribution (and hence coordinated spending) limits to which those others are unquestionably subject?

4

The preceding question assumes that parties enjoy a power and experience that sets them apart from other political spenders. But in fact the assumption is too crude. While parties command bigger spending budgets than most individuals, some individuals could easily rival party committees in spending. Rich political activists crop up, and the United States has known its Citizens Kane. Their money speaks loudly, too, and they are therefore burdened by restrictions on its use just as parties are. And yet they are validly subject to coordinated spending limits, *Buckley*, 424 U. S., at 46–47, and so are PACs, *id.*, at 35–36, 46–47, which may amass bigger treasuries than most party members can spare for politics.[15]

Just as rich donors, media executives, and PACs have the means to speak as loudly as parties do, they would also have the capacity to work effectively in tandem with a candidate, just as a party can do. While a candidate has no way of coordinating spending with every contributor, there is nothing hard about coordinating with someone with a fortune to donate, any more than a candidate would have difficulty in coordinating spending with an inner circle of personal political associates or with his own family. Yet all of them are

[15] By noting that other political actors are validly burdened by limitations on their coordinated spending, we do not mean to take a position as to the wisdom of policies that promote one source of campaign funding or another. Cf. Brief for Respondent 27, n. 17 (citing academic support for expanding the role of parties in campaign finance).

subject to coordinated spending limits upheld in *Buckley, supra,* at 53, n. 59. A party, indeed, is now like some of these political actors in yet another way: in its right under *Colorado I* to spend money in support of a candidate without legal limit so long as it spends independently. A party may spend independently every cent it can raise wherever it thinks its candidate will shine, on every subject and any viewpoint.

A party is not, therefore, in a unique position. It is in the same position as some individuals and PACs, as to whom coordinated spending limits have already been held valid, *Buckley, supra,* at 46–47; and, indeed, a party is better off, for a party has the special privilege the others do not enjoy, of making coordinated expenditures up to the limit of the Party Expenditure Provision.[16]

5

The Party's arguments for being treated differently from other political actors subject to limitation on political spending under the Act do not pan out. Despite decades of limitation on coordinated spending, parties have not been rendered useless. In reality, parties continue to organize to elect candidates, and also function for the benefit of donors whose object is to place candidates under obligation, a fact that parties cannot escape. Indeed, parties' capacity to concentrate power to elect is the very capacity that apparently opens them to exploitation as channels for circumventing contribution and coordinated spending limits binding on other political players. And some of these players could marshal the same power and sophistication for the same electoral objectives as political parties themselves.

[16] This is the position of the FEC in the aftermath of *Colorado I:* that a party committee may make coordinated expenditures up to the amount of its expenditure limit, in addition to the amount of direct contributions permitted by the generally applicable contribution limit. Brief for Petitioner 5–6, and n. 3.

We accordingly apply to a party's coordinated spending limitation the same scrutiny we have applied to the other political actors, that is, scrutiny appropriate for a contribution limit, enquiring whether the restriction is "closely drawn" to match what we have recognized as the "sufficiently important" government interest in combating political corruption. *Shrink Missouri*, 528 U. S., at 387–388 (quoting *Buckley*, *supra*, at 25, 30).[17] With the standard thus settled, the issue remains whether adequate evidentiary grounds exist to sustain the limit under that standard, on the theory that unlimited coordinated spending by a party raises the risk of corruption (and its appearance) through circumvention of valid contribution limits. Indeed, all Members of the Court agree that circumvention is a valid theory of corruption; the remaining bone of contention is evidentiary.[18]

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[17] Whether a different characterization, and hence a different type of scrutiny, could be appropriate in the context of an as-applied challenge focused on application of the limit to specific expenditures is a question that, as JUSTICE THOMAS notes, *post*, at 468, n. 2, we need not reach in this facial challenge. Cf. Brief for Petitioner 9, n. 5 (noting that the FEC has solicited comments regarding possible criteria for identifying coordinated expenditures).

The Party appears to argue that even if the Party Expenditure Provision is justified with regard to coordinated expenditures that amount to no more than payment of the candidate's bills, the limitation is facially invalid because of its potential application to expenditures that involve more of the party's own speech. Brief for Respondent 48–49. But the Party does not tell us what proportion of the spending falls in one category or the other, or otherwise lay the groundwork for its facial overbreadth claim. Cf. *Broadrick* v. *Oklahoma*, 413 U. S. 601 (1973) (overbreadth must be substantial to trigger facial invalidation).

[18] Apart from circumvention, the FEC also argues that the Party Expenditure Provision is justified by a concern with *quid pro quo* arrangements and similar corrupting relationships between candidates and parties themselves, see Brief for Petitioner 33–38. We find no need to reach that argument because the evidence supports the long-recognized rationale of combating circumvention of contribution limits designed to combat the corrupting influence of large contributions to candidates from individuals

B

Since there is no recent experience with unlimited coordinated spending, the question is whether experience under the present law confirms a serious threat of abuse from the unlimited coordinated party spending as the Government contends. Cf. *Burson* v. *Freeman*, 504 U. S. 191, 208 (1992) (opinion of Blackmun, J.) (noting difficulty of mustering evidence to support long-enforced statutes). It clearly does. Despite years of enforcement of the challenged limits, substantial evidence demonstrates how candidates, donors, and parties test the limits of the current law, and it shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced by declaring parties' coordinated spending wide open.[19]

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and nonparty groups. The dissent does not take issue with this justification as a theoretical matter. See also 213 F. 3d 1221, 1232 (CA10 2000) (Court of Appeals acknowledging circumvention as a possible "avenue of abuse").

[19] In *Colorado I*, the principal opinion suggested that the Party Expenditure Provision was not enacted out of "a special concern about the potentially 'corrupting' effect of party expenditures, but rather for the constitutionally insufficient purpose of reducing what [Congress] saw as wasteful and excessive campaign spending." 518 U. S., at 618. That observation was relevant to our examination of the Party Expenditure Provision as applied to independent expenditures, see *id.*, at 617–618, limits on which were invalidated with regard to other political actors in *Buckley* in part because they were justified by concern with wasteful campaign spending, *Buckley*, 424 U. S., at 57. Our point in *Colorado I* was that there was no evidence that Congress had a special motivation regarding parties that would justify limiting their independent expenditures after similar limits imposed on other spenders had been invalidated. As for the Party Expenditure Provision's application to coordinated expenditures, on the other hand, the evidence discussed in the text suggests that the anticircumvention rationale that justifies other coordinated expenditure limits, see *Buckley*, *supra*, at 46–47, is at work here as well. The dissent ignores this distinction, *post*, at 475, but neither the dissent nor the Party seriously argues that Congress was not concerned with circumvention of contribution limits using parties as conduits. All acknowledge that Congress enacted other measures prompted by just that concern. See *post*, at 481;

Under the Act, a donor is limited to $2,000 in contributions to one candidate in a given election cycle. The same donor may give as much as another $20,000 each year to a national party committee supporting the candidate.[20] What a realist would expect to occur has occurred. Donors give to the party with the tacit understanding that the favored candidate will benefit. See App. 247 (declaration of Robert Hickmott, former Democratic fundraiser and National Finance Director for Timothy Wirth's Senate campaign) ("We . . . told contributors who had made the maximum allowable contribution to the Wirth campaign but who wanted to do more that they could raise money for the DSCC so that we could get our maximum [Party Expenditure Provision] allocation from the DSCC"); *id.*, at 274 (declaration of Timothy Wirth) ("I understood that when I raised funds for the DSCC, the donors expected that I would receive the amount of their donations multiplied by a certain number that the DSCC had determined in advance, assuming the DSCC has raised other funds"); *id.*, at 166 (declaration of Leon G. Billings, former Executive Director of the Democratic Senatorial Campaign Committee (DSCC)) ("People often contribute to party committees because they have given the maximum amount to a candidate, and want to help the candidate indirectly by contributing to the party"); *id.*, at 99–100 (fundraising letter from Congressman Wayne Allard, dated Aug. 27, 1996, explaining to contributor that "you are at the limit of what you can directly contribute to my campaign," but "you can further help my campaign by assisting the Colorado Republican Party").[21]

Brief for Respondent 41–42 ("FECA provides interlocking multilayered provisions designed to prevent circumvention").

[20] See n. 7, *supra;* see generally Federal Election Commission, Campaign Guide for Congressional Candidates and Committees 10 (1999).

[21] Contrary to the dissent's suggestion, *post*, at 477–478, we are not closing our eyes to District Court findings rejecting this record evidence. After alluding to the evidence cited above, 41 F. Supp. 2d 1197, 1203–1204 (Colo. 1999), and concluding that it did not support theories of corruption that we do not address here, see *id.*, at 1211; n. 18, *supra*, the District

Although the understanding between donor and party may involve no definite commitment and may be tacit on the donor's part, the frequency of the practice and the volume of money involved has required some manner of informal bookkeeping by the recipient. In the Democratic Party, at least, the method is known as "tallying," a system that helps to connect donors to candidates through the accommodation of a party. See App. 246–247 (Hickmott declaration) ("[The tally system] is an informal agreement between the DSCC and the candidates' campaigns that if you help the DSCC raise contributions, we will turn around and help your campaign"); *id.*, at 268 (declaration of former Senator Paul Simon) ("Donors would be told the money they contributed could be credited to any Senate candidate. The callers would make clear that this was not a direct contribution, but it was fairly close to direct"); *id.*, at 165–166 (Billings declaration) ("There appeared to be an understanding between the DSCC and the Senators that the amount of money they received from the DSCC was related to how much they raised for the Committee").[22]

Such is the state of affairs under the current law, which requires most party spending on a candidate's behalf to be

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Court mistakenly concluded that *Colorado I* had rejected the anticircumvention rationale as a matter of law, 41 F. Supp. 2d, at 1211, n. 9. We explain below, *infra*, at 463–465, why *Colorado I*'s rejection of the anticircumvention rationale in the context of limits applied to independent party expenditures does not control the outcome of this case.

[22] The dissent dismisses this evidence as describing "legal" practices. *Post*, at 479. The dissent may be correct that the FEC considers tallying legal, see Reply Brief for Petitioner 9, n. 3, but one thing is clear: tallying is a sign that contribution limits are being diluted and could be diluted further if the floodgates were open. Why, after all, does a party bother to tally? The obvious answer is that it wants to know who gets the benefit of the contributions to the party, as the record quotations attest. See also n. 23, *infra*. And the fact that the parties may not fund sure losers, stressed by the dissent (*post*, at 478–479), is irrelevant. The issue is what would become of contribution limits if parties could use unlimited coordinated spending to funnel contributions to those serious contenders who are favored by the donors.

done independently, and thus less desirably from the point of view of a donor and his favored candidate. If suddenly every dollar of spending could be coordinated with the candidate, the inducement to circumvent would almost certainly intensify. Indeed, if a candidate could be assured that donations through a party could result in funds passed through to him for spending on virtually identical items as his own campaign funds, a candidate enjoying the patronage of affluent contributors would have a strong incentive not merely to direct donors to his party, but to promote circumvention as a step toward reducing the number of donors requiring time-consuming cultivation. If a candidate could arrange for a party committee to foot his bills, to be paid with $20,000 contributions to the party by his supporters, the number of donors necessary to raise $1,000,000 could be reduced from 500 (at $2,000 per cycle) to 46 (at $2,000 to the candidate and $20,000 to the party, without regard to donations outside the election year).[23]

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[23] Any such dollar-for-dollar pass-through would presumably be too obvious to escape the special provision on earmarking, 2 U. S. C. § 441a(a)(8), see *infra*, at 462. But the example illustrates the undeniable inducement to more subtle circumvention.

The same enhanced value of coordinated spending that could be expected to promote greater circumvention of contribution limits for the benefit of the candidate-fundraiser would probably enhance the power of the fundraiser to use circumvention as a tactic to increase personal power and a claim to party leadership. The affluent nominee can already do this to a limited extent, by directing donations to the party and making sure that the party knows who raised the money, and that the needier candidates who receive the benefit of party spending know whom to thank. The candidate can thus become a player beyond his own race, and the donor's influence is multiplied. See generally App. 249 (Hickmott declaration) ("Incumbents who were not raising money for themselves because they were not up for reelection would sometimes raise money for other Senators, or for challengers. They would send $20,000 to the DSCC and ask that this be entered on another candidate's tally. They might do this, for example, if they were planning to run for a leadership position and wanted to obtain the support of the Senators they assisted"). If the effectiveness of party spending could be enhanced by limitless coordination, the ties of straitened candidates to prosperous ones and, vicariously, to

V

While this evidence rules out denying the potential for corruption by circumvention, the Party does try to minimize the threat. It says that most contributions to parties are small, with negligible corrupting momentum to be carried through the party conduit. Brief for Respondent 14. But some contributions are not small; they can go up to $20,000, 2 U. S. C. § 441a(a)(1)(B),[24] and the record shows that even under present law substantial donations turn the parties into matchmakers whose special meetings and receptions give the donors the chance to get their points across to the candidates.[25] The Party again discounts the threat of outflanking contribution limits on individuals and nonparty groups by stressing that incumbent candidates give more excess campaign funds to parties than parties spend on coordinated expenditures. Brief for Respondent 34. But the fact that parties may do well for themselves off incumbents does not defuse concern over circumvention; if contributions to a party were not used as a funnel from donors to candidates, there would be no reason for using the tallying system the way the witnesses have described it.

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large donors would be reinforced as well. Party officials who control distribution of coordinated expenditures would obviously form an additional link in this chain. See *id.*, at 164, 168 (Billings declaration) ("[The DSCC's three-member Executive Committee] basically made the decisions as to how to distribute the money. . . . Taking away the limits on coordinated expenditures would result in a fundamental transferal of power to certain individual Senators").

[24] In 1996, 46 percent of itemized (over $200) individual contributions to the Democratic national party committees and 15 percent of such contributions to the Republican national party committees were $10,000 or more. Biersack & Haskell, Spitting on the Umpire: Political Parties, the Federal Election Campaign Act, and the 1996 Campaigns, in Financing the 1996 Election 155, 160 (J. Green ed. 1999).

[25] For example, the DSCC has established exclusive clubs for the most generous donors, who are invited to special meetings and social events with Senators and candidates. App. 254–255 (Hickmott declaration).

Finally, the Party falls back to claiming that, even if there is a threat of circumvention, the First Amendment demands a response better tailored to that threat than a limitation on spending, even coordinated spending. *Id.*, at 46–48. The Party has two suggestions.

First, it says that better crafted safeguards are in place already, in particular the earmarking rule of § 441a(a)(8), which provides that contributions that "are in any way earmarked or otherwise directed through an intermediary or conduit to [a] candidate" are treated as contributions to the candidate. The Party says that this provision either suffices to address any risk of circumvention or would suffice if clarified to cover practices like tallying. *Id.*, at 42, 47; see also 213 F. 3d, at 1232. This position, however, ignores the practical difficulty of identifying and directly combating circumvention under actual political conditions. Donations are made to a party by contributors who favor the party's candidates in races that affect them; donors are (of course) permitted to express their views and preferences to party officials; and the party is permitted (as we have held it must be) to spend money in its own right. When this is the environment for contributions going into a general party treasury, and candidate-fundraisers are rewarded with something less obvious than dollar-for-dollar pass-throughs (distributed through contributions and party spending), circumvention is obviously very hard to trace. The earmarking provision, even if it dealt directly with tallying, would reach only the most clumsy attempts to pass contributions through to candidates. To treat the earmarking provision as the outer limit of acceptable tailoring would disarm any serious effort to limit the corrosive effects of what Chief Judge Seymour called "'understandings' regarding what donors give what amounts to the party, which candidates are to receive what funds from the party, and what interests particular donors are seeking to promote," *id.*, at 1241 (dissenting opinion); see also Briffault, Political Parties and Campaign Finance Re-

form, 100 Colum. L. Rev. 620, 652 (2000) (describing "web of relations linking major donors, party committees, and elected officials").[26]

The Party's second preferred prescription for the threat of an end run calls for replacing limits on coordinated expenditures by parties with limits on contributions to parties, the latter supposedly imposing a lesser First Amendment burden. Brief for Respondent 46–48. The Party thus invokes the general rule that contribution limits take a lesser First Amendment toll, expenditure limits a greater one. That was one strand of the reasoning in *Buckley* itself, which rejected the argument that limitations on independent expenditures by individuals, groups, and candidates were justifiable in order to avoid circumvention of contribution limitations. 424 U. S., at 44. It was also one strand of the logic of the *Colorado I* principal opinion in rejecting the Party Expenditure Provision's application to independent party expenditures. 518 U. S., at 617.[27]

In each of those cases, however, the Court's reasoning contained another strand. The analysis ultimately turned on the understanding that the expenditures at issue were not potential alter egos for contributions, but were independent and therefore functionally true expenditures, qualifying for the most demanding First Amendment scrutiny employed in *Buckley*. *Colorado I*, *supra*, at 617; *Buckley*, *supra*, at 44–47. Thus, in *Colorado I* we could not assume, "absent

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[26] The Party's argument for relying on better earmarking enforcement, accepted by the dissent, *post*, at 481, would invite a corresponding attack on all contribution limits. As we said in *Buckley*, 424 U. S., at 27–28, and *Shrink Missouri*, 528 U. S., at 390, the policy supporting contribution limits is the same as for laws against bribery. But we do not throw out the contribution limits for unskillful tailoring; prohibitions on bribery, like the earmarking provision here, address only the "most blatant and specific" attempts at corruption, 424 U. S., at 28.

[27] The dissent therefore suggests, *post*, at 482, and the District Court mistakenly concluded, see discussion n. 21, *supra*, that *Colorado I* disposed of the tailoring question for purposes of this case.

convincing evidence to the contrary," that the Party's independent expenditures formed a link in a chain of corruption-by-conduit. 518 U. S., at 617. "The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate," *Buckley, supra,* at 47; therefore, "the constitutionally significant fact" in *Colorado I* was "the lack of coordination between the candidate and the source of the expenditure," 518 U. S., at 617.

Here, however, just the opposite is true. There is no significant functional difference between a party's coordinated expenditure and a direct party contribution to the candidate, and there is good reason to expect that a party's right of unlimited coordinated spending would attract increased contributions to parties to finance exactly that kind of spending.[28] Coordinated expenditures of money donated to a party are tailor-made to undermine contribution limits. Therefore the choice here is not, as in *Buckley* and *Colorado I,* between a limit on pure contributions and pure expenditures.[29] The choice is between limiting contributions and

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[28] The dissent notes a superficial tension between this analysis and our recent statement in *Bartnicki* v. *Vopper,* 532 U. S. 514 (2001), that "it would be quite remarkable to hold that speech by a law-abiding [entity] can be suppressed in order to deter conduct by a non-law-abiding third party," *id.,* at 529–530. Unlike *Bartnicki,* there is no clear dichotomy here between law abider and lawbreaker. The problem of circumvention is a systemic one, accomplished only through complicity between donor and party.

[29] Also, again, contrast *Bartnicki,* where the gulf between the First Amendment implications of two enforcement options was clear. We rejected the decision to penalize disclosure of lawfully obtained information of public interest instead of vigorously enforcing prohibitions on intercepting private conversations. *Ibid.*

limiting expenditures whose special value as expenditures is also the source of their power to corrupt. Congress is entitled to its choice.

* * *

We hold that a party's coordinated expenditures, unlike expenditures truly independent, may be restricted to minimize circumvention of contribution limits. We therefore reject the Party's facial challenge and, accordingly, reverse the judgment of the United States Court of Appeals for the Tenth Circuit.

It is so ordered.

JUSTICE THOMAS, with whom JUSTICE SCALIA and JUSTICE KENNEDY join, and with whom THE CHIEF JUSTICE joins as to Part II, dissenting.

The Party Expenditure Provision, 2 U. S. C. § 441a(d)(3), severely limits the amount of money that a national or state committee of a political party can spend in coordination with its own candidate for the Senate or House of Representatives. See *ante*, at 438–439, and n. 3. Because this provision sweeps too broadly, interferes with the party-candidate relationship, and has not been proved necessary to combat corruption, I respectfully dissent.

I

As an initial matter, I continue to believe that *Buckley* v. *Valeo*, 424 U. S. 1 (1976) *(per curiam)*, should be overruled. See *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 410 (2000) (THOMAS, J., dissenting); *Colorado Republican Federal Campaign Comm.* v. *Federal Election Comm'n*, 518 U. S. 604, 631 (1996) *(Colorado I)* (THOMAS, J., concurring in judgment and dissenting in part). "Political speech is the primary object of First Amendment protection," *Shrink Missouri, supra*, at 410–411 (THOMAS, J., dissenting); see also *Eu* v. *San Francisco County Democratic Central*

Comm., 489 U. S. 214, 223 (1989); *Mills* v. *Alabama*, 384 U. S. 214, 218 (1966), and it is the lifeblood of a self-governing people, see *Shrink Missouri*, *supra*, at 405 (KENNEDY, J., dissenting) ("[P]olitical speech in the course of elections [is] the speech upon which democracy depends"). I remain baffled that this Court has extended the most generous First Amendment safeguards to filing lawsuits, wearing profane jackets, and exhibiting drive-in movies with nudity,[1] but has offered only tepid protection to the core speech and associational rights that our Founders sought to defend.

In this case, the Government does not attempt to argue that the Party Expenditure Provision satisfies strict scrutiny, see *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 45 (1983) (providing that, under strict scrutiny, a restriction on speech is constitutional only if it is narrowly tailored to serve a compelling governmental interest). Nor could it. For the reasons explained in my separate opinions in *Colorado I*, *supra*, at 641–644, and *Shrink Missouri*, *supra*, at 427–430, the campaign financing law at issue fails strict scrutiny.

II

We need not, however, overrule *Buckley* and apply strict scrutiny in order to hold the Party Expenditure Provision unconstitutional. Even under *Buckley*, which described the requisite scrutiny as "exacting" and "rigorous," 424 U. S., at 16, 29, the regulation cannot pass constitutional muster. In practice, *Buckley* scrutiny has meant that restrictions on contributions by individuals and political committees do not violate the First Amendment so long as they are "closely drawn" to match a "sufficiently important" government interest, *Shrink Missouri*, *supra*, at 387–389; see also *Buckley*, *supra*, at 58, but that restrictions on independent expendi-

[1] *NAACP* v. *Button*, 371 U. S. 415, 444 (1963); *Cohen* v. *California*, 403 U. S. 15, 26 (1971); *Erznoznik* v. *Jacksonville*, 422 U. S. 205, 208–215 (1975).

tures are constitutionally invalid, see *Buckley*, *supra*, at 58–59; see also *Federal Election Comm'n* v. *National Conservative Political Action Comm.*, 470 U. S. 480, 501 (1985). The rationale for this distinction between contributions and independent expenditures has been that, whereas ceilings on contributions by individuals and political committees "entai[l] only a marginal restriction" on First Amendment interests, *Buckley*, 424 U. S., at 20, limitations on independent expenditures "impose significantly more severe restrictions on protected freedoms of political expression and association," *id.*, at 23.

A

The Court notes this existing rationale and attempts simply to treat coordinated expenditures by political parties as equivalent to contributions by individuals and political committees. Thus, at least implicitly, the Court draws two conclusions: coordinated expenditures are no different from contributions, and political parties are no different from individuals and political committees. Both conclusions are flawed.

1

The Court considers a coordinated expenditure to be an "'expenditur[e] made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents.'" *Ante*, at 438 (quoting 2 U. S. C. § 441a(a)(7)(B)(i)). This definition covers a broad array of conduct, some of which is akin to an independent expenditure. At one extreme, to be sure, are outlays that are "virtually indistinguishable from simple contributions." *Colorado I*, 518 U. S., at 624 (opinion of BREYER, J.). An example would be "a donation of money with direct payment of a candidate's media bills." *Ibid.* But toward the other end of the spectrum are expenditures that largely resemble, and should be entitled to the same protection as, independent expenditures.

Take, for example, a situation in which the party develops a television advertising campaign touting a candidate's record on education, and the party simply "consult[s]," 2 U. S. C. § 441a(a)(7)(B)(i), with the candidate on which time slot the advertisement should run for maximum effectiveness. I see no constitutional difference between this expenditure and a purely independent one. In the language of *Buckley*, the advertising campaign is not a mere "general expression of support for the candidate and his views," but a communication of "the underlying basis for the support." 424 U. S., at 21. It is not just "symbolic expression," *ibid.*, but a clear manifestation of the party's most fundamental political views. By restricting such speech, the Party Expenditure Provision undermines parties' "freedom to discuss candidates and issues," *ibid.*, and cannot be reconciled with our campaign finance jurisprudence.

2

Even if I were to ignore the breadth of the statutory text, and to assume that all coordinated expenditures are functionally equivalent to contributions,[2] I still would strike down the Party Expenditure Provision. The source of the "contribution" at issue is a political party, not an individual or a political committee, as in *Buckley* and *Shrink Missouri.*

[2] The Court makes this very assumption. See *ante*, at 464 ("There is no significant functional difference between a party's coordinated expenditure and a direct party contribution to the candidate"). To the extent the Court has not defined the universe of coordinated expenditures and leaves open the possibility that there are such expenditures that would not be functionally identical to direct contributions, the constitutionality of the Party Expenditure Provision as applied to such expenditures remains unresolved. See, *e. g.*, *ante*, at 456, n. 17. At oral argument, the Government appeared to suggest that the Party Expenditure Provision might not reach expenditures that are not functionally identical to contributions. See Tr. of Oral Arg. 15 (stating that the purpose of the Party Expenditure Provision is simply to prevent someone "from making contributions in the form of paying the candidate's bills").

Restricting contributions by individuals and political committees may, under *Buckley*, entail only a "marginal restriction," *Buckley, supra*, at 20, but the same cannot be said about limitations on political parties.

Political parties and their candidates are "inextricably intertwined" in the conduct of an election. *Colorado I, supra*, at 630 (KENNEDY, J., concurring in judgment and dissenting in part). A party nominates its candidate; a candidate often is identified by party affiliation throughout the election and on the ballot; and a party's public image is largely defined by what its candidates say and do. See, *e. g., California Democratic Party* v. *Jones*, 530 U. S. 567, 575 (2000) ("Some political parties—such as President Theodore Roosevelt's Bull Moose Party, the La Follette Progressives of 1924, the Henry Wallace Progressives of 1948, and the George Wallace American Independent Party of 1968—are virtually inseparable from their nominees (and tend not to outlast them)"); see also M. Zak, Back to Basics for the Republican Party 1 (2000) (noting that the Republican Party has been identified as the "Party of Lincoln"). Most importantly, a party's success or failure depends in large part on whether its candidates get elected. Because of this unity of interest, it is natural for a party and its candidate to work together and consult with one another during the course of the election. See, *e. g.*, App. 137 (declaration of Herbert E. Alexander, Director of the Citizens' Research Foundation at the University of Southern California). Indeed, "it would be impractical and imprudent . . . for a party to support its own candidates without some form of 'cooperation' or 'consultation.'" See *Colorado I*, 518 U. S., at 630 (KENNEDY, J., concurring in judgment and dissenting in part). "[C]andidates are necessary to make the party's message known and effective, and vice versa." *Id.*, at 629. Thus, the ordinary means for a party to provide support is to make coordinated expenditures, see, *e. g.*, App. 137–138 (declaration of Herbert E. Alexander), as the Government itself maintained just five years ago, see

Brief for Respondent in *Colorado I*, O. T. 1995, No. 95–489, p. 27 (contending that Congress had made an "empirical judgment that party officials will as a matter of course consult with the party's candidates before funding communications intended to influence the outcome of a federal election"); see also FEC Advisory Opinion 1985–14, CCH Fed. Election Camp. Fin. Guide ¶ 5819, p. 11,186, n. 4 (1985) ("Party political committees are incapable of making independent expenditures").

As the District Court explained, to break this link between the party and its candidates would impose "additional costs and burdens to promote the party message." 41 F. Supp. 2d 1197, 1210 (Colo. 1999). This observation finds full support in the record. See, *e. g.*, App. 218 (statement of Anthony Corrado, Associate Professor of Government, Colby College) (explaining that, to ensure that expenditures were independent, party organizations had to establish legally separate entities, which in turn had to "rent and furnish an office, hire staff, and pay other administrative costs," as well as "engage additional consulting services" and "duplicate many of the functions already being undertaken by other party offices"); *id.*, at 52 (statement by Federal Election Commission admitting that national party established separate entities that made independent expenditures); *id.*, at 217 (statement of Anthony Corrado) (explaining that reliance on independent expenditures would increase fundraising demands on party organizations because independent expenditures are less effective means of communication); *id.*, at 219 ("[I]ndependent expenditures do not qualify for the lowest unit rates on the purchase of broadcasting time"); App. in No. 99–1211 (CA10), p. 512 (report of Frank J. Sorauf, professor at University of Minnesota, and Jonathan S. Krasno, professor at Princeton University) (noting inefficiency of independent expenditures). Establishing and maintaining independence also tends to create voter confusion and to undermine the candidate that the party sought to support. App. 220 (statement of Anthony Corrado); App. in No. 99–1211 (CA10), at 623–624

(deposition of John Heubusch); App. 159 (affidavit of Donald K. Bain) ("[O]ur communications can be more focused, understandable, and effective if the Party and its candidates can work together"). Finally, because of the ambiguity in the term "coordinated expenditure," the Party Expenditure Provision chills permissible speech as well. See, *e. g.*, *id.*, at 159–160 (affidavit of Donald K. Bain). Thus, far from being a mere "marginal" restraint on speech, *Buckley*, 424 U. S., at 20, the Party Expenditure Provision has restricted the party's most natural form of communication; has precluded parties "from effectively amplifying the voice of their adherents," *id.*, at 22; and has had a "stifling effect on the ability of the party to do what it exists to do."[3] *Colorado I*, *supra*, at 630 (KENNEDY, J., concurring in judgment and dissenting in part).

The Court nevertheless concludes that these concerns of inhibiting party speech are rendered "implausible" by the nearly 30 years of history in which coordinated spending has been statutorily limited. *Ante*, at 449. Without a single citation to the record, the Court rejects the assertion "that for almost three decades political parties have not been func-

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[3] The Court contends that, notwithstanding this burden, "it is nonetheless *possible* for parties, like individuals and nonparty groups, to speak independently." *Ante*, at 450, n. 11 (emphasis added). That is correct, but it does not render the restriction constitutional. If Congress were to pass a law imposing a $1,000 tax on every political newspaper editorial, the law would surely constitute an unconstitutional restraint on speech, even though it would still be *possible* for newspapers to print such editorials.

The Court's holding presents an additional First Amendment problem. Because of the close relationship between parties and candidates, lower courts will face a difficult, if not insurmountable, task in trying to determine whether particular party expenditures are in fact coordinated or independent. As the American Civil Liberties Union points out, "[e]ven if such an inquiry is feasible, it inevitably would involve an intrusive and constitutionally troubling investigation of the inner workings of political parties." Brief for American Civil Liberties Union et al. as *Amici Curiae* 18.

tional or have been functioning in systematic violation of the law." *Ibid.* I am unpersuaded by the Court's attempts to downplay the extent of the burden on political parties' First Amendment rights. First, the Court does not examine the record or the findings of the District Court, but instead relies wholly on the "observ[ations]" of the "political scientists" who happen to have written an *amicus* brief in support of the petitioner. *Ibid.* I find more convincing, and more relevant, the record evidence that the parties have developed, which, as noted above, indicates that parties have suffered as a result of the Party Expenditure Provision.[4] See *supra*, at 470–471. Second, we have never before upheld a limitation on speech simply because speakers have coped with the limitation for 30 years. See, *e. g.*, *Bartnicki* v. *Vopper*, 532 U. S. 514, 517 (2001) (holding unconstitutional under the First Amendment restrictions on the disclosure of the contents of an illegally intercepted communication, even though federal law had prohibited such disclosure for 67 years). And finally, if the passage of time were relevant to the constitutional inquiry, I would wonder why the Court adopted

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[4] Moreover, were I to depart from the record, as does the Court, I could consider sources suggesting that parties in fact have lost power in recent years. See, *e. g.*, M. Wattenberg, The Decline of American Political Parties, 1952–1996, p. 174 (1998) (indicating that percentage of voters who identify with a party has declined while percentage of split tickets has increased); Maisel, American Political Parties: Still Central to a Functioning Democracy?, in American Political Parties: Decline or Resurgence?, 103, 107–111 (J. Cohen, R. Fleisher, & P. Kantor eds. 2001) (describing weaknesses of modern political parties). I also could explore how political parties have coped with the restrictions on coordinated expenditures. As JUSTICE KENNEDY has explained, "[t]he Court has forced a substantial amount of political speech underground, as contributors and candidates devise ever more elaborate methods of avoiding contribution limits." *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 406 (2000) (dissenting opinion). Perhaps political parties have survived, not because the regulation at issue imposes less than a substantial burden on speech, but simply because the parties have found "underground" alternatives for communication.

a "30-year" rule rather than the possible countervailing "200-year" rule. For nearly 200 years, this country had congressional elections without limitations on coordinated expenditures by political parties. Nowhere does the Court suggest that these elections were not "functional," *ante*, at 449, or that they were marred by corruption.

The Court's only other response to the argument that parties are linked to candidates and that breaking this link would impose significant costs on speech is no response at all. The Court contends that parties are not organized simply to "elec[t] particular candidates" as evidenced by the fact that many political action committees donate money to both parties and sometimes even opposing candidates. *Ante*, at 451. According to the Court, "[p]arties are thus necessarily the instruments of some contributors whose object is not to support the party's message or to elect party candidates across the board." *Ante*, at 451–452. There are two flaws in the Court's analysis. First, no one argues that a party's role is merely to get particular candidates elected. Surely, among other reasons, parties also exist to develop and promote a platform. See, *e. g.*, Brief for Respondent 23. The point is simply that parties and candidates have shared interests, that it is natural for them to work together, and that breaking the connection between parties and their candidates inhibits the promotion of the party's message. Second, the mere fact that some donors contribute to both parties and their candidates does not necessarily imply that the donors control the parties or their candidates. It certainly does not mean that the parties are mere "instruments" or "agents," *ante*, at 452, of the donors. Indeed, if a party receives money from donors on both sides of an issue, how can it be a tool of both donors? If the Green Party were to receive a donation from an industry that pollutes, would the Green Party necessarily become, through no choice of its own, an instrument of the polluters? The Court proffers no evidence that parties have become pawns of wealthy contrib-

utors. Parties might be the target of the speech of donors, but that does not suggest that parties are influenced (let alone improperly influenced) by the speech. Thus, the Court offers no explanation for why political parties should be treated the same as individuals and political committees.

B

But even if I were to view parties' coordinated expenditures as akin to contributions by individuals and political committees, I still would hold the Party Expenditure Provision constitutionally invalid. Under *Shrink Missouri*, a contribution limit is constitutional only if the Government demonstrates that the regulation is "closely drawn" to match a "sufficiently important interest." 528 U. S., at 387–388 (quoting *Buckley*, 424 U. S., at 25) (internal quotation marks omitted). In this case, there is no question that the Government has asserted a sufficient interest, that of preventing corruption. See *Shrink Missouri*, *supra*, at 388 ("'[T]he prevention of corruption and the appearance of corruption' was found to be a 'constitutionally sufficient justification'") (quoting *Buckley*, *supra*, at 25–26). The question is whether the Government has demonstrated both that coordinated expenditures by parties give rise to corruption and that the restriction is "closely drawn" to curb this corruption. I believe it has not.

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As this Court made clear just last Term, "[w]e have never accepted mere conjecture as adequate to carry a First Amendment burden." *Shrink Missouri*, 528 U. S., at 392. Some "quantum of empirical evidence [is] needed to satisfy heightened judicial scrutiny of legislative judgments." *Id.*, at 391. Precisely how much evidence is required will "vary up or down with the novelty and plausibility of the justification raised." *Ibid.* Today, the Court has jettisoned this evidentiary requirement.

Considering that we have never upheld an expenditure limitation against political parties, I would posit that substantial evidence is necessary to justify the infringement of parties' First Amendment interests. But we need not accept this high evidentiary standard to strike down the Party Expenditure Provision for want of evidence. Under the least demanding evidentiary requirement, the Government has failed to carry its burden, for it has presented no evidence at all of corruption or the perception of corruption. The Government does not, and indeed cannot, point to any congressional findings suggesting that the Party Expenditure Provision is necessary, or even helpful, in reducing corruption or the perception of corruption. In fact, this Court has recognized that "Congress wrote the Party Expenditure Provision not so much because of a special concern about the potentially 'corrupting' effect of party expenditures, but rather for the constitutionally insufficient purpose of reducing what it saw as wasteful and excessive campaign spending."[5] *Colorado I*, 518 U. S., at 618. See also *ibid.* ("[R]ather than indicating a special fear of the corruptive influence of political parties, the legislative history demonstrates Congress' general desire to enhance what was seen as an important and legitimate role for political parties in American elections").

Without explanation, the Court departs from this earlier, well-considered understanding of the Party Expenditure Provision. Were there any evidence of corruption in the

[5] The Court contends that I "ignor[e] [a] distinction," *ante*, at 457, n. 19: Whereas Congress may not have been concerned with corruption insofar as independent expenditures were implicated, Congress was concerned with corruption insofar as coordinated expenditures were implicated. This "distinction" must have been lost on Congress as well, which made no finding that the Party Expenditure Provision serves different purposes for different expenditures. It also was lost on the Court in *Colorado I*, which stated in no uncertain terms that Congress was not motivated by "the potentially 'corrupting' effect of party expenditures." 518 U. S., at 618.

record that the parties have since developed, such a departure might be justified. But as the District Court found, "[t]he facts which [the] FEC contends support its position . . . do not establish that the limit on party coordinated expenditures is necessary to prevent corruption or the appearance thereof." 41 F. Supp. 2d, at 1211. Indeed, "[n]one of the FEC's examples [of alleged corruption] involve[s] coordinated expenditures." *Ibid.* See also App. in No. 99–1211 (CA10), at 346 (declaration of Herbert E. Alexander) ("In the decades since 1974, when coordinated expenditures were allowed for both presidential and congressional campaigns, there has not been any dispute relating to them, no charges of corruption or the appearance thereof . . ."); *id.*, at 430 (statement of Anthony Corrado) ("There is no academic analysis or scholarly study conducted to date that demonstrates that parties are corrupted by the federally regulated contributions, the so-called 'hard-money funds,' they receive from donors. None of the studies of party finance or party coordinated spending contend[s] that these funds are corruptive or generate the appearance of corruption in the political process"); *id.*, at 624 (deposition of John Heubusch) (testifying that, in his experience, political party spending was not a source of corruption of Members of the United States Senate).[6]

The dearth of evidence is unsurprising in light of the unique relationship between a political party and its candidates: "The very aim of a political party is to influence its candidate's stance on issues and, if the candidate takes office or is reelected, his votes." *Colorado I*, 518 U. S., at

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[6] In *Missouri Republican Party* v. *Lamb*, 227 F. 3d 1070 (2000), the Eighth Circuit held that the State of Missouri's restrictions on contributions by political parties violated the First Amendment. In accord with the Tenth Circuit in this case, the Eighth Circuit concluded that "the record is wholly devoid of any evidence that limiting parties' campaign contributions will either reduce corruption or measurably decrease the number of occasions on which limitations on individuals' campaign contributions are circumvented." *Id.*, at 1073.

646 (THOMAS, J., concurring in judgment and dissenting in part). If coordinated expenditures help achieve this aim, the achievement "does not . . . constitute 'a subversion of the political process.'" *Ibid.* (quoting *Federal Election Comm'n*, 470 U. S., at 497). It is simply the essence of our Nation's party system of government. One can speak of an individual citizen or a political action committee corrupting or coercing a candidate, but "[w]hat could it mean for a party to 'corrupt' its candidate or to exercise 'coercive' influence over him?" 518 U. S., at 646.

Apparently unable to provide an answer to this question, the Court relies upon an alternative theory of corruption. According to the Court, the Party Expenditure Provision helps combat circumvention of the limits on individual donors' contributions, which limits are necessary to reduce corruption by those donors.[7] See *ante*, at 452–455. The primary problem with this contention, however, is that it too is plainly contradicted by the findings of the District Court, see 41 F. Supp. 2d, at 1211, and the overwhelming evidence in the record, see *supra*, at 475.[8] And this contention is particularly surprising in light of *Colorado I*, in which we discussed the same opportunity for corruption through circumvention, and, far from finding it dispositive, concluded

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[7] The Court does not argue that the Party Expenditure Provision is necessary to reduce the perception of corruption. Nor could the record sustain such an argument. See 41 F. Supp. 2d 1197, 1211 (Colo. 1999).

[8] Contrary to the Court's suggestion, *ante*, at 459, n. 21, the District Court did not simply conclude that "*Colorado I* had rejected the anti-circumvention rationale as a matter of law." Instead, the District Court first concluded there was no evidence of corruption, 41 F. Supp. 2d, at 1211. Only after the District Court made this factual finding did it, in a footnote, cite *Colorado I* to support the legal conclusion. See 41 F. Supp. 2d, at 1211, n. 9 ("Moreover, if the skirting of contribution limits is the issue with which the FEC is concerned . . . there are more tailored means of addressing such a concern than limiting the coordinated expenditure limits" (citing *Colorado I*)).

that any opportunity for corruption was, "at best, attenuated." 518 U. S., at 616.

Without addressing the District Court's determination or reflecting on this Court's understanding in *Colorado I*, the Court today asserts that its newfound position is supported by "substantial evidence." The best evidence the Court can come up with, however, is the Democratic Senatorial Campaign Committee's (DSCC) use of the "tally system," which "connect[s] donors to candidates through the accommodation of a party." *Ante*, at 459. The tally system is not evidence of corruption-by-circumvention. In actuality, the DSCC is not acting as a mere conduit, allowing donors to contribute money in excess of the legal limits. The DSCC instead has allocated money based on a number of factors, including "the financial strength of the campaign," "what [the candidate's] poll numbers looked like," and "who had the best chance of winning or who needed the money most." App. 250–251 (declaration of Robert Hickmott, former Democratic fundraiser and National Finance Director for Timothy Wirth's Senate campaign); see also App. in No. 99–1211 (CA10), at 430 (statement of Anthony Corrado) ("When parties are deciding whether to spend funds on behalf of a candidate, they chiefly examine the competitiveness of the district or race, the political situation of the incumbent, and the strength of the party contender's candidacy"); *id.*, at 563 (deposition of Donald Bain) (stating that the party generally did not support someone who has a safe seat or is clearly not going to win). As the District Court found, "the primary consideration in allocating funds is which races are marginal—that is, which races are ones where party money could be the difference between winning and losing." 41 F. Supp. 2d, at 1203. "Maintaining party control over seats is paramount to the parties' pursuits." *Ibid.*; see also App. in No. 99–1211 (CA10), at 483 (stating that primary goal of legislative campaign committees is "to win or maintain control of the chamber and the powers of the majority legislative party"). The

"bottom line" of the tally system is that "some candidates get back more money than they raise, and others get back less." App. 250 (declaration of Robert Hickmott).

Moreover, the Court does not explain how the tally system could constitute evidence of corruption. Both the initial contribution to the party and the subsequent expenditure by the party on the candidate are currently legal. In essence, the Court is asserting that it is corrupt for parties to do what is legal to enhance their participation in the political process. Each step in the process is permitted, but the combination of those steps, the Court apparently believes, amounts to corruption sufficient to silence those who wish to support a candidate. In my view, the First Amendment demands a more coherent explication of the evidence of corruption.[9]

Finally, even if the tally system were evidence of corruption-through-circumvention, it is only evidence of what is occurring under the current system, not of additional "corruption" that would arise in the absence of the Party Expenditure Provision. The Court speculates that, if we invalidated the Party Expenditure Provision, "the inducement to circumvent would almost certainly intensify." *Ante*, at 460. But that is nothing more than supposition, which is insufficient under our precedents to sustain a restriction on First Amendment interests. See *Shrink Missouri*, 528 U. S., at 392 ("We have never accepted mere conjecture as adequate to carry a First Amendment burden"). See also *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 822 (2000) (concluding that the government "must present more than anecdote and supposition"). And it is weak supposition at that. The Court does not contend that

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[9] Ironically, earlier this Term, this Court was less willing to uphold a speech restriction based on inference of circumvention. See, *e. g.*, *Bartnicki* v. *Vopper*, 532 U. S. 514, 529–535 (2001) (holding unconstitutional the prohibition on disclosure of illegally intercepted conversation even though the initial step in the disclosure process, the interception, was illegal and harmful to those whose privacy was invaded).

the DSCC's alleged efforts to channel money through the tally system were restricted in any way by the Party Expenditure Provision. On the contrary, the Court suggests that a donation to the DSCC was increased by the party; in other words, the candidate got more than the initial donation. See *ante*, at 458 (quoting declaration of Timothy Wirth) ("'I understood that when I raised funds for the DSCC, the donors expected that I would receive the amount of their donations *multiplied* by a certain number that the DSCC had determined in advance, *assuming the DSCC has raised other funds*'" (emphasis added)). Because I am unpersuaded by weak speculation ungrounded in any evidence, I disagree with the Court's conclusion that the Party Expenditure Provision furthers the Government interest of reducing corruption.[10]

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[10] The other "evidence" on which the Court relies is less compelling than the tally system. The Court presents four quotations, two of which do not even support the proposition that donations are funneled through parties to candidates. See *ante*, at 458 (quoting declaration of Leon G. Billings, former Executive Director of the DSCC); *ante*, at 458. These comments simply reflect the obvious fact that a candidate benefits when his party receives money. Neither comment suggests that the candidate is aided through the surreptitious laundering of money, as opposed to issue advertisements, get-out-the-vote campaigns, and independent expenditures.

The other two quotations are somewhat suspect in that they are made by Timothy Wirth, who was the object of the negative advertisements giving rise to this lawsuit, and by his national finance director. See *ibid.* (quoting App. 274 (declaration of Timothy Wirth)); App. 247 (declaration of Robert Hickmott, former Democratic fundraiser and National Finance Director for Timothy Wirth's Senate campaign). Moreover, neither Wirth nor his finance director described how donations were actually treated by the DSCC, either in general or in Wirth's particular case; instead Wirth and his finance director simply reflected on their understandings of how the money would be used in Wirth's election. As noted above, the District Court found that "the primary consideration in allocating funds is which races are marginal." 41 F. Supp. 2d, at 1203. And the evidence in the record supports this finding. See *supra*, at 477.

Even if the Government had presented evidence that the Party Expenditure Provision affects corruption, the statute still would be unconstitutional, because there are better tailored alternatives for addressing the corruption. In addition to bribery laws and disclosure laws, see *Shrink Missouri*, *supra*, at 428 (THOMAS, J., dissenting), the Government has two options that would not entail the restriction of political parties' First Amendment rights.

First, the Government could enforce the earmarking rule of 2 U. S. C. § 441a(a)(8), under which contributions that "are in any way earmarked or otherwise directed through an intermediary or conduit to [a] candidate" are treated as contributions to the candidate. Vigilant enforcement of this provision is a precise response to the Court's circumvention concerns. If a donor contributes $2,000 to a candidate (the maximum donation in an election cycle), he cannot direct the political party to funnel another dime to the candidate without confronting the Federal Election Campaign Act's civil and criminal penalties, see 2 U. S. C. § 437g(a)(6)(C) (civil); § 437g(d) (criminal).

According to the Court, reliance on this earmarking provision "ignores the practical difficulty of identifying and directly combating circumvention" and "would reach only the most clumsy attempts to pass contributions through to candidates." *Ante*, at 462. The Court, however, does not cite any evidence to support this assertion. Nor does it articulate what failed steps the Government already has taken. Nor does it explain why the burden that the Government allegedly would have to bear in uncovering circumvention justifies the infringement of political parties' First Amendment rights. In previous cases, we have not been so willing to overlook such failures. See, *e. g.*, *Bartnicki*, 532 U. S., at 530–531 ("[T]here is no empirical evidence to support the assumption that the prohibition against disclosures reduces the number of illegal interceptions").

In any event, there is a second, well-tailored option for combating corruption that does not entail the reduction of parties' First Amendment freedoms. The heart of the Court's circumvention argument is that, whereas individuals can donate only $2,000 to a candidate in a given election cycle, they can donate $20,000 to the national committees of a political party, an amount that is allegedly large enough to corrupt the candidate. See *ante*, at 453. If indeed $20,000 is enough to corrupt a candidate (an assumption that seems implausible on its face and is, in any event, unsupported by any evidence), the proper response is to lower the cap. That way, the speech restriction is directed at the source of the alleged corruption—the individual donor—and not the party. "The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it." *Bartnicki*, 532 U. S., at 529. "[I]t would be quite remarkable to hold that speech by a law-abiding [entity] can be suppressed in order to deter conduct by a non-law-abiding third party." *Id.*, at 529–530. The Court takes that unorthodox path today, a decision that is all the more remarkable considering that the controlling opinion in *Colorado I* expressly rejected it just five years ago. 518 U. S., at 617 ("We could understand how Congress, were it to conclude that the potential for evasion of the individual contribution limits was a serious matter, might decide to change the statute's limitations on contributions to political parties. But we do not believe that the risk of corruption present here could justify the 'markedly greater burden on basic freedoms caused by' the statute's limitations on *expenditures*" (citations omitted)).

In my view, it makes no sense to contravene a political party's core First Amendment rights because of what a third party might unlawfully try to do. Instead of broadly restricting political parties' speech, the Government should have pursued better-tailored alternatives for combating the alleged corruption.

Syllabus

NEW YORK TIMES CO., INC., ET AL. *v.* TASINI ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 00–201. Argued March 28, 2001—Decided June 25, 2001

Respondent freelance authors (Authors) wrote articles (Articles) for newspapers and a magazine published by petitioners New York Times Company (Times), Newsday, Inc. (Newsday), and Time, Inc. (Time). The Times, Newsday, and Time (Print Publishers) engaged the Authors as independent contractors under contracts that in no instance secured an Author's consent to placement of an Article in an electronic database. The Print Publishers each licensed rights to copy and sell articles to petitioner LEXIS/NEXIS, owner and operator of NEXIS. NEXIS is a computerized database containing articles in text-only format from hundreds of periodicals spanning many years. Subscribers access NEXIS through a computer, may search for articles using criteria such as author and subject, and may view, print, or download each article yielded by the search. An article's display identifies its original print publication, date, section, initial page number, title, and author, but each article appears in isolation—without visible link to other stories originally published in the same periodical edition. NEXIS does not reproduce the print publication's formatting features such as headline size and page placement. The Times also has licensing agreements with petitioner University Microfilms International (UMI), authorizing reproduction of Times materials on two CD–ROM products. One, the New York Times OnDisc (NYTO), is a text-only database containing Times articles presented in essentially the same way they appear in LEXIS/NEXIS. The other, General Periodicals OnDisc (GPO), is an image-based system that reproduces the Times' Sunday Book Review and Magazine exactly as they appeared on the printed pages, complete with photographs, captions, advertisements, and other surrounding materials. The two CD–ROM products are searchable in much the same way as LEXIS/NEXIS; in both, articles retrieved by users provide no links to other articles appearing in the original print publications.

The Authors filed this suit, alleging that their copyrights were infringed when, as permitted and facilitated by the Print Publishers, LEXIS/NEXIS and UMI (Electronic Publishers) placed the Articles in NEXIS, NYTO, and GPO (Databases). The Authors sought declaratory and injunctive relief, and damages. In response to the Authors' complaint, the Print and Electronic Publishers raised the privilege ac-

corded collective work copyright owners by § 201(c) of the Copyright Act. That provision, pivotal in this case, reads: "Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series." The District Court granted the Publishers summary judgment, holding, *inter alia*, that the Databases reproduced and distributed the Authors' works, in § 201(c)'s words, "as part of . . . [a] revision of that collective work" to which the Authors had first contributed. The Second Circuit reversed, granting the Authors summary judgment on the ground that the Databases were not among the collective works covered by § 201(c), and specifically, were not "revisions" of the periodicals in which the Articles first appeared.

Held: Section 201(c) does not authorize the copying at issue here. The Publishers are not sheltered by § 201(c) because the Databases reproduce and distribute articles standing alone and not in context, not "as part of that particular collective work" to which the author contributed, "as part of . . . any revision" thereof, or "as part of . . . any later collective work in the same series." Pp. 493–506.

(a) Where, as here, a freelance author has contributed an article to a collective work, copyright in the contribution vests initially in its author. § 201(c). Copyright in the collective work vests in the collective author (here, the Print Publisher) and extends only to the creative material contributed by that author, not to "the preexisting material employed in the work," § 103(b). Congress enacted the provisions of the 1976 revision of the Copyright Act at issue to address the unfair situation under prior law, whereby authors risked losing their rights when they placed an article in a collective work. The 1976 Act recast the copyright as a bundle of discrete "exclusive rights," § 106, each of which "may be transferred . . . and owned separately," § 201(d)(2). The Act also provided, in § 404(a), that "a single notice applicable to the collective work as a whole is sufficient" to protect the rights of freelance contributors. Together, § 404(a) and § 201(c) preserve the author's copyright in a contribution to a collective work. Under § 201(c)'s terms, a publisher could reprint a contribution from one issue in a later issue of its magazine, and could reprint an article from one edition of an encyclopedia in a later revision of it, but could not revise the contribution itself or include it in a new anthology or an entirely different collective work. Es-

sentially, § 201(c) adjusts a publisher's copyright in its collective work to accommodate a freelancer's copyright in her contribution. If there is demand for a freelance article standing alone or in a new collection, the Copyright Act allows the freelancer to benefit from that demand; after authorizing initial publication, the freelancer may also sell the article to others. Cf. *Stewart* v. *Abend*, 495 U. S. 207, 229, 230. It would scarcely preserve the author's copyright in a contribution as contemplated by Congress if a print publisher, without the author's permission, could reproduce or distribute discrete copies of the contribution in isolation or within new collective works. Pp. 493–497.

(b) The Publishers' view that inclusion of the Articles in the Databases lies within the "privilege of reproducing and distributing the [Articles] as part of . . . [a] revision of that collective work," § 201(c), is unacceptable. In determining whether the Articles have been reproduced and distributed "as part of" a "revision," the Court focuses on the Articles as presented to, and perceptible by, a Database user. See §§ 102, 101. Here, the three Databases present articles to users clear of the context provided either by the original periodical editions or by any revision of those editions. The Databases first prompt users to search the universe of their contents: thousands or millions of files containing individual articles from thousands of collective works (*i. e.*, editions), either in one series (the Times, in NYTO) or in scores of series (the sundry titles in NEXIS and GPO). When the user conducts a search, each article appears as a separate item within the search result. In NEXIS and NYTO, an article appears to a user without the graphics, formatting, or other articles with which it was initially published. In GPO, the article appears with the other materials published on the same page or pages, but without any material published on other pages of the original periodical. In either circumstance, the Database does not reproduce and distribute the article "as part of" either the original edition or a "revision" of that edition. The articles may be viewed as parts of a new compendium—namely, the entirety of works in the Database. Each edition of each periodical, however, represents only a miniscule fraction of the ever-expanding Database. The massive whole of the Database is not recognizable as a new version of its every small part. Furthermore, the Articles in the Databases may be viewed "as part of" no larger work at all, but simply as individual articles presented individually. That each article bears marks of its origin in a particular periodical suggests the article was *previously* part of that periodical, not that the article is *currently* reproduced or distributed as part of the periodical. The Databases' reproduction and distribution of individual Articles—simply *as individual Articles*—would invade the core of the Authors' exclusive rights. The Publishers' analogy between the Data-

bases and microfilm and microfiche is wanting: In the Databases, unlike microfilm, articles appear disconnected from their original context. Unlike the conversion of newsprint to microfilm, the transfer of articles to the Databases does not represent a mere conversion of intact periodicals (or revisions of periodicals) from one medium to another. The Databases offer users individual articles, not intact periodicals. The concept of "media-neutrality" invoked by the Publishers should therefore protect the Authors' rights, not the Publishers'. The result is not changed because users can manipulate the Databases to generate search results consisting entirely of articles from a particular periodical edition. Under § 201(c), the question is not whether a user can assemble a revision of a collective work from a database, but whether the database itself perceptibly presents the author's contribution as part of a revision of the collective work. That result is not accomplished by these Databases. Pp. 498–504.

(c) The Publishers' warning that a ruling for the Authors will have "devastating" consequences, punching gaping holes in the electronic record of history, is unavailing. It hardly follows from this decision that an injunction against the inclusion of these Articles in the Databases (much less all freelance articles in any databases) must issue. The Authors and Publishers may enter into an agreement allowing continued electronic reproduction of the Authors' works; they, and if necessary the courts and Congress, may draw on numerous models for distributing copyrighted works and remunerating authors for their distribution. In any event, speculation about future harms is no basis for this Court to shrink authorial rights created by Congress. The Court leaves remedial issues open for initial airing and decision in the District Court. Pp. 504–506.

206 F. 3d 161, affirmed.

GINSBURG, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BREYER, J., joined, *post*, p. 506.

Laurence H. Tribe argued the cause for petitioners. With him on the briefs were *Jonathan S. Massey, Bruce P. Keller, Jeffrey P. Cunard, Michael R. Potenza, Peter C. Johnson,* and *Thomas C. Goldstein.*

Laurence Gold argued the cause for respondents Tasini et al. With him on the brief were *Patricia A. Felch, Daniel W. Sherrick, Michael H. Gottesman,* and *Leon Dayan.*

Emily Maruja Bass filed a brief for respondents Garson et al.*

JUSTICE GINSBURG delivered the opinion of the Court.

This copyright case concerns the rights of freelance authors and a presumptive privilege of their publishers. The litigation was initiated by six freelance authors and relates to articles they contributed to three print periodicals (two newspapers and one magazine). Under agreements with the periodicals' publishers, but without the freelancers' consent, two computer database companies placed copies of the freelancers' articles—along with all other articles from the periodicals in which the freelancers' work appeared—into three databases. Whether written by a freelancer or staff member, each article is presented to, and retrievable by, the user in isolation, clear of the context the original print publication presented.

The freelance authors' complaint alleged that their copyrights had been infringed by the inclusion of their articles in the databases. The publishers, in response, relied on the

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*Briefs of *amici curiae* urging reversal were filed for Advance Publications, Inc., et al. by *Charles S. Sims, Jerry S. Birenz, Harold W. Fuson, Jr., Andrew A. Merdek, Barbara W. Wall, Katherine Hatton, Barbara Cohen,* and *Clifford M. Sloan;* for the National Geographic Society by *Kenneth W. Starr, Christopher Landau, Terrence B. Adamson,* and *Robert G. Sugarman;* for the Software & Information Industry Association et al. by *Henry B. Gutman, Arthur R. Miller,* and *James F. Rittinger;* and for Ken Burns et al. by *Michael F. Clayton* and *Brett I. Miller.*

Briefs of *amici curiae* urging affirmance were filed for the American Library Association et al. by *Arnold P. Lutzker;* for the Authors Guild, Inc., et al. by *Leon Friedman;* for the International Federation of Journalists by *Thomas M. Peterson* and *Brett M. Schuman;* and for Ellen Schrecker et al. by *Theodore M. Lieverman.*

Briefs of *amici curiae* were filed for the American Intellectual Property Law Association by *Paul E. Lacy* and *Daniel W. McDonald;* and for the American Society of Media Photographers, Inc., et al. by *L. Donald Prutzman* and *Victor S. Perlman.*

privilege of reproduction and distribution accorded them by § 201(c) of the Copyright Act, which provides:

> "Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series." 17 U. S. C. § 201(c).

Specifically, the publishers maintained that, as copyright owners of collective works, *i. e.*, the original print publications, they had merely exercised "the privilege" § 201(c) accords them to "reproduc[e] and distribut[e]" the author's discretely copyrighted contribution.

In agreement with the Second Circuit, we hold that § 201(c) does not authorize the copying at issue here. The publishers are not sheltered by § 201(c), we conclude, because the databases reproduce and distribute articles standing alone and not in context, not "as part of that particular collective work" to which the author contributed, "as part of . . . any revision" thereof, or "as part of . . . any later collective work in the same series." Both the print publishers and the electronic publishers, we rule, have infringed the copyrights of the freelance authors.

I

A

Respondents Jonathan Tasini, Mary Kay Blakely, Barbara Garson, Margot Mifflin, Sonia Jaffe Robbins, and David S. Whitford are authors (Authors). Between 1990 and 1993, they wrote the 21 articles (Articles) on which this dispute centers. Tasini, Mifflin, and Blakely contributed 12 Articles to The New York Times, the daily newspaper published by

petitioner The New York Times Company (Times). Tasini, Garson, Robbins, and Whitford wrote eight Articles for Newsday, another New York daily paper, published by petitioner Newsday, Inc. (Newsday). Whitford also contributed one Article to Sports Illustrated, a weekly magazine published by petitioner Time, Inc. (Time). The Authors registered copyrights in each of the Articles. The Times, Newsday, and Time (Print Publishers) registered collective work copyrights in each periodical edition in which an Article originally appeared. The Print Publishers engaged the Authors as independent contractors (freelancers) under contracts that in no instance secured consent from an Author to placement of an Article in an electronic database.[1]

At the time the Articles were published, all three Print Publishers had agreements with petitioner LEXIS/NEXIS (formerly Mead Data Central Corp.), owner and operator of NEXIS, a computerized database that stores information in a text-only format. NEXIS contains articles from hundreds of journals (newspapers and periodicals) spanning many years. The Print Publishers have licensed to LEXIS/NEXIS the text of articles appearing in the three periodicals. The licenses authorize LEXIS/NEXIS to copy and sell any portion of those texts.

Pursuant to the licensing agreements, the Print Publishers regularly provide LEXIS/NEXIS with a batch of all the articles published in each periodical edition. The Print Publisher codes each article to facilitate computerized retrieval, then transmits it in a separate file. After further coding, LEXIS/NEXIS places the article in the central discs of its database.

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[1] In the District Court, Newsday and Time contended that the freelancers who wrote for their publications had entered into agreements authorizing reproduction of the Articles in the databases. The Court of Appeals ruled that Newsday's defense was waived, and rejected Time's argument on the merits. Neither petitioner presses the contention here.

Subscribers to NEXIS, accessing the system through a computer, may search for articles by author, subject, date, publication, headline, key term, words in text, or other criteria. Responding to a search command, NEXIS scans the database and informs the user of the number of articles meeting the user's search criteria. The user then may view, print, or download each of the articles yielded by the search. The display of each article includes the print publication (*e. g.*, The New York Times), date (September 23, 1990), section (Magazine), initial page number (26), headline or title ("Remembering Jane"), and author (Mary Kay Blakely). Each article appears as a separate, isolated "story"—without any visible link to the other stories originally published in the same newspaper or magazine edition. NEXIS does not contain pictures or advertisements, and it does not reproduce the original print publication's formatting features such as headline size, page placement (*e. g.*, above or below the fold for newspapers), or location of continuation pages.

The Times (but not Newsday or Time) also has licensing agreements with petitioner University Microfilms International (UMI). The agreements authorize reproduction of Times materials on two CD–ROM products, the New York Times OnDisc (NYTO) and General Periodicals OnDisc (GPO).

Like NEXIS, NYTO is a text-only system. Unlike NEXIS, NYTO, as its name suggests, contains only the Times. Pursuant to a three-way agreement, LEXIS/NEXIS provides UMI with computer files containing each article as transmitted by the Times to LEXIS/NEXIS. Like LEXIS/NEXIS, UMI marks each article with special codes. UMI also provides an index of all the articles in NYTO. Articles appear in NYTO in essentially the same way they appear in NEXIS, *i. e.*, with identifying information (author, title, etc.), but without original formatting or accompanying images.

GPO contains articles from approximately 200 publications or sections of publications. Unlike NEXIS and NYTO, GPO is an image-based, rather than a text-based, system. The Times has licensed GPO to provide a facsimile of the Times' Sunday Book Review and Magazine. UMI "burns" images of each page of these sections onto CD–ROMs. The CD–ROMs show each article exactly as it appeared on printed pages, complete with photographs, captions, advertisements, and other surrounding materials. UMI provides an index and abstracts of all the articles in GPO.

Articles are accessed through NYTO and GPO much as they are accessed through NEXIS. The user enters a search query using similar criteria (*e. g.*, author, headline, date). The computer program searches available indexes and abstracts, and retrieves a list of results matching the query. The user then may view each article within the search result, and may print the article or download it to a disc. The display of each article provides no links to articles appearing on other pages of the original print publications.[2]

B

On December 16, 1993, the Authors filed this civil action in the United States District Court for the Southern District of New York. The Authors alleged that their copyrights were infringed when, as permitted and facilitated by the Print Publishers, LEXIS/NEXIS and UMI (Electronic Publishers) placed the Articles in the NEXIS, NYTO, and GPO databases (Databases). The Authors sought declaratory

[2] For example, the GPO user who retrieves Blakely's "Remembering Jane" article will see the entirety of Magazine page 26, where the article begins, and Magazine page 78, where the article continues and ends. The NYTO user who retrieves Blakely's article will see only the text of the article and its identifying information (author, headline, publication, page number, etc.). Neither the GPO retrieval nor the NYTO retrieval produces any text on page 27, page 79, or any other page. The user who wishes to see other pages may not simply "flip" to them. She must conduct a new search.

and injunctive relief, and damages. In response to the Authors' complaint, the Print and Electronic Publishers raised the reproduction and distribution privilege accorded collective work copyright owners by 17 U. S. C. § 201(c). After discovery, both sides moved for summary judgment.

The District Court granted summary judgment for the Publishers, holding that § 201(c) shielded the Database reproductions. 972 F. Supp. 804, 806 (1997). The privilege conferred by § 201(c) is transferable, the court first concluded, and therefore could be conveyed from the original Print Publishers to the Electronic Publishers. *Id.*, at 816. Next, the court determined, the Databases reproduced and distributed the Authors' works, in § 201(c)'s words, "as part of . . . [a] revision of that collective work" to which the Authors had first contributed. To qualify as "revisions," according to the court, works need only "preserve some significant original aspect of [collective works]—whether an original selection or an original arrangement." *Id.*, at 821. This criterion was met, in the District Court's view, because the Databases preserved the Print Publishers' "selection of articles" by copying all of the articles originally assembled in the periodicals' daily or weekly issues. *Id.*, at 823. The Databases "highlight[ed]" the connection between the articles and the print periodicals, the court observed, by showing for each article not only the author and periodical, but also the print publication's particular issue and page numbers. *Id.*, at 824 ("[T]he electronic technologies not only copy the publisher defendants' complete original 'selection' of articles, they tag those articles in such a way that the publisher defendants' original selection remains evident online.").

The Authors appealed, and the Second Circuit reversed. 206 F. 3d 161 (1999). The Court of Appeals granted summary judgment for the Authors on the ground that the Databases were not among the collective works covered by § 201(c), and specifically, were not "revisions" of the periodicals in which the Articles first appeared. *Id.*, at 167–170. Just as § 201(c) does not "permit a Publisher to sell a hard

copy of an Author's article directly to the public even if the Publisher also offered for individual sale all of the other articles from the particular edition," the court reasoned, so § 201(c) does not allow a Publisher to "achieve the same goal indirectly" through computer databases. *Id.*, at 168. In the Second Circuit's view, the Databases effectively achieved this result by providing multitudes of "individually retrievable" articles. *Ibid.* As stated by the Court of Appeals, the Databases might fairly be described as containing "new anthologfies] of innumerable" editions or publications, but they do not qualify as "revisions" of particular editions of periodicals in the Databases. *Id.*, at 169. Having concluded that § 201(c) "does not permit the Publishers," acting without the author's consent, "to license individually copyrighted works for inclusion in the electronic databases," the court did not reach the question whether the § 201(c) privilege is transferable. *Id.*, at 165, and n. 2.

We granted certiorari to determine whether the copying of the Authors' Articles in the Databases is privileged by 17 U. S. C. § 201(c). 531 U. S. 978 (2000). Like the Court of Appeals, we conclude that the § 201(c) privilege does not override the Authors' copyrights, for the Databases do not reproduce and distribute the Articles as part of a collective work privileged by § 201(c). Accordingly, and again like the Court of Appeals, we find it unnecessary to determine whether the privilege is transferable.

II

Under the Copyright Act, as amended in 1976, "[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated." 17 U. S. C. § 102(a). When, as in this case, a freelance author has contributed an article to a "collective work" such as a newspaper or magazine, see § 101 (defining "collective work"), the statute recognizes two distinct copyrighted works: "Copyright in *each separate contribution to a collec-*

tive work is distinct from copyright in *the collective work as a whole* . . . ." § 201(c) (emphasis added). Copyright in the separate contribution "vests initially in the author of the contribution" (here, the freelancer). *Ibid.* Copyright in the collective work vests in the collective author (here, the newspaper or magazine publisher) and extends only to the creative material contributed by that author, not to "the preexisting material employed in the work," § 103(b). See also *Feist Publications, Inc.* v. *Rural Telephone Service Co.*, 499 U. S. 340, 358 (1991) (copyright in "compilation"—a term that includes "collective works," 17 U. S. C. § 101—is limited to the compiler's original "selection, coordination, and arrangement").

Prior to the 1976 revision, as the courts below recognized, see 206 F. 3d, at 168; 972 F. Supp., at 815, authors risked losing their rights when they placed an article in a collective work. Pre-1976 copyright law recognized a freelance author's copyright in a published article only when the article was printed with a copyright notice in the author's name. See Copyright Act of 1909, § 18, 35 Stat. 1079. When publishers, exercising their superior bargaining power over authors, declined to print notices in each contributor's name, the author's copyright was put in jeopardy. See Kaminstein, Divisibility of Copyrights, Study No. 11, in Copyright Law Revision Studies Nos. 11–13, prepared for the Senate Committee on the Judiciary, 86th Cong., 2d Sess., 18 (1960). The author did not have the option to assign only the right of publication in the periodical; such a partial assignment was blocked by the doctrine of copyright "indivisibility." See *id.*, at 11. Thus, when a copyright notice appeared only in the publisher's name, the author's work would fall into the public domain, unless the author's copyright, in its entirety, had passed to the publisher. See *id.*, at 18. Such complete transfer might be accomplished by a contract, perhaps one with a provision, not easily enforced, for later retransfer of rights back to the author. See *id.*, at 20–22. Or, absent a specific contract, a court might find that an author had tacitly

transferred the entire copyright to a publisher, in turn deemed to hold the copyright in "trust" for the author's benefit. See *id.*, at 18–19; see generally 3 M. Nimmer & D. Nimmer, Copyright § 10.01[C][2], pp. 10–12 to 10–14 (2000).

In the 1976 revision, Congress acted to "clarify and improve [this] confused and frequently unfair legal situation with respect to rights in contributions." H. R. Rep. No. 94–1476, p. 122 (1976) (hereinafter H. R. Rep.).[3] The 1976 Act rejected the doctrine of indivisibility, recasting the copyright as a bundle of discrete "exclusive rights," 17 U. S. C. § 106 (1994 ed. and Supp. V),[4] each of which "may be trans-

[3] Two Registers of Copyrights have observed that the 1976 revision of the Copyright Act represented "a break with a two-hundred-year-old tradition that has identified copyright more closely with the publisher than with the author." Letter from M. Peters to Rep. McGovern, reprinted in 147 Cong. Rec. E182 (Feb. 14, 2001) (hereinafter Peters Letter) (quoting Ringer, First Thoughts on the Copyright Act of 1976, 22 N. Y. L. S. L. Rev. 477, 490 (1977)). The intent to enhance the author's position vis-à-vis the patron is also evident in the 1976 Act's work-for-hire provisions. See *Community for Creative Non-Violence* v. *Reid*, 490 U. S. 730, 742–750 (1989); see also 17 U. S. C. § 203(a)(5) (inalienable authorial right to revoke a copyright transfer). Congress' adjustment of the author/publisher balance is a permissible expression of the "economic philosophy behind the [Copyright Clause]," *i. e.*, "the conviction that encouragement of individual effort [motivated] by personal gain is the best way to advance public welfare." *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U. S. 539, 558 (1985) (quoting *Mazer* v. *Stein*, 347 U. S. 201, 219 (1954)).

[4] As amended, § 106 now provides: "Subject to sections 107 through 121, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

"(1) to reproduce the copyrighted work in copies or phonorecords;

"(2) to prepare derivative works based upon the copyrighted work;

"(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

"(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

"(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the indi-

ferred . . . and owned separately," § 201(d)(2).[5] Congress also provided, in § 404(a), that "a single notice applicable to the collective work as a whole is sufficient" to protect the rights of freelance contributors. And in § 201(c), Congress codified the discrete domains of "[c]opyright in each separate contribution to a collective work" and "copyright in the collective work as a whole." Together, § 404(a) and § 201(c) "preserve the author's copyright in a contribution even if the contribution does not bear a separate notice in the author's name, and without requiring any unqualified transfer of rights to the owner of the collective work." H. R. Rep. 122.

Section 201(c) both describes and circumscribes the "privilege" a publisher acquires regarding an author's contribution to a collective work:

> "In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired *only* the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series." (Emphasis added.)

A newspaper or magazine publisher is thus privileged to reproduce or distribute an article contributed by a freelance author, absent a contract otherwise providing, only "as part of" any (or all) of three categories of collective works: (a) "that collective work" to which the author contributed her work, (b) "any revision of that collective work," or (c) "any later collective work in the same series." In accord with Congress' prescription, a "publishing company could reprint

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vidual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

"(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission."

[5] It bears repetition here, see *supra*, at 493, that we neither decide nor express any view on whether the § 201(c) "privilege" may be transferred.

a contribution from one issue in a later issue of its magazine, and could reprint an article from a 1980 edition of an encyclopedia in a 1990 revision of it; the publisher could not revise the contribution itself or include it in a new anthology or an entirely different magazine or other collective work." H. R. Rep. 122–123.

Essentially, § 201(c) adjusts a publisher's copyright in its collective work to accommodate a freelancer's copyright in her contribution. If there is demand for a freelance article standing alone or in a new collection, the Copyright Act allows the freelancer to benefit from that demand; after authorizing initial publication, the freelancer may also sell the article to others. Cf. *Stewart* v. *Abend*, 495 U. S. 207, 229 (1990) ("[w]hen an author produces a work which later commands a higher price in the market than the original bargain provided, the copyright statute [*i. e.*, the separate renewal term of former 17 U. S. C. § 24] is designed to provide the author the power to negotiate for the realized value of the work"); *id.*, at 230 (noting author's "inalienable termination right" under current 17 U. S. C. §§ 203, 302 (1994 ed. and Supp. V)). It would scarcely "preserve the author's copyright in a contribution" as contemplated by Congress, H. R. Rep. 122, if a newspaper or magazine publisher were permitted to reproduce or distribute copies of the author's contribution in isolation or within new collective works. See Gordon, Fine-Tuning *Tasini:* Privileges of Electronic Distribution and Reproduction, 66 Brooklyn L. Rev. 473, 484 (2000).[6]

[6] The dissenting opinion suggests that a ruling for the Publishers today would maintain, even enhance, authors' "valuable copyright protection." *Post*, at 521 (opinion of STEVENS, J.). We are not so certain. When the reader of an article in a periodical wishes to obtain other works by the article's author, the Databases enable that reader simply to print out the author's articles, without buying a "new anthology . . . or other collective work," H. R. Rep. 122–123. In years past, books compiling stories by journalists such as Janet Flanner and Ernie Pyle might have sold less well had the individual articles been freely and permanently available on

III

In the instant case, the Authors wrote several Articles and gave the Print Publishers permission to publish the Articles in certain newspapers and magazines. It is undisputed that the Authors hold copyrights and, therefore, exclusive rights in the Articles.[7] It is clear, moreover, that the Print and Electronic Publishers have exercised at least some rights that § 106 initially assigns exclusively to the Authors: LEXIS/NEXIS' central discs and UMI's CD–ROMs "reproduce . . . copies" of the Articles, § 106(1); UMI, by selling those CD–ROMs, and LEXIS/NEXIS, by selling copies of the Articles through the NEXIS Database, "distribute copies" of the Articles "to the public by sale," § 106(3); and the Print Publishers, through contracts licensing the production of copies in the Databases, "authorize" reproduction and distribution of the Articles, § 106.[8]

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line. In the present, print collections of reviews, commentaries, and reportage may prove less popular because of the Databases. The Register of Copyrights reports that "freelance authors have experienced significant economic loss" due to a "digital revolution that has given publishers [new] opportunities to exploit authors' works." Peters Letter E182.

More to the point, even if the dissent is correct that some authors, in the long run, are helped, not hurt, by Database reproductions, the fact remains that the Authors who brought the case now before us have asserted their rights under § 201(c). We may not invoke our conception of their interests to diminish those rights.

[7] The Publishers do not claim that the Articles are "work[s] made for hire." 17 U. S. C. § 201(b). As to such works, the employer or person for whom a work was prepared is treated as the author. *Ibid.* The Print Publishers, however, neither engaged the Authors to write the Articles as "employee[s]" nor "commissioned" the Articles through "a written instrument signed by [both parties]" indicating that the Articles shall be considered "work[s] made for hire." § 101 (1994 ed., Supp. V) (defining "work made for hire").

[8] Satisfied that the Publishers exercised rights § 106 initially assigns exclusively to the Author, we need resolve no more on that score. Thus, we do not reach an issue the Register of Copyrights has argued vigorously. The Register maintains that the Databases publicly "display" the Articles,

Against the Authors' charge of infringement, the Publishers do not here contend the Authors entered into an agreement authorizing reproduction of the Articles in the Databases. See *supra*, at 489, n. 1. Nor do they assert that the copies in the Databases represent "fair use" of the Authors' Articles. See 17 U. S. C. § 107 ("fair use of a copyrighted work . . . is not an infringement"; four factors identified among those relevant to fair use determination). Instead, the Publishers rest entirely on the privilege described in § 201(c). Each discrete edition of the periodicals in which the Articles appeared is a "collective work," the Publishers agree. They contend, however, that reproduction and distribution of each Article by the Databases lie within the "privilege of reproducing and distributing the [Articles] as part of . . . [a] revision of that collective work," § 201(c). The Publishers' encompassing construction of the § 201(c) privilege is unacceptable, we conclude, for it would diminish the Authors' exclusive rights in the Articles.

In determining whether the Articles have been reproduced and distributed "as part of" a "revision" of the collective works in issue, we focus on the Articles as presented to, and perceptible by, the user of the Databases. See § 102 (copyright protection subsists in original works fixed in any medium "from which they can be perceived, reproduced, or otherwise communicated"); see also § 101 (1994 ed., Supp. V) (definitions of "copies" and "fixed"); Haemmerli, Commentary: *Tasini v. New York Times Co.*, 22 Colum.-VLA. J. L. & Arts 129, 142–143 (1998). In this case, the three Databases present articles to users clear of the context provided either by the original periodical editions or by any revision of those editions. The Databases first prompt users to search the universe of their contents: thousands or millions of files con-

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§ 106(5); because § 201(c) does not privilege "display," the Register urges, the § 201(c) privilege does not shield the Databases. See Peters Letter E182–E183.

taining individual articles from thousands of collective works (*i. e.*, editions), either in one series (the Times, in NYTO) or in scores of series (the sundry titles in NEXIS and GPO). When the user conducts a search, each article appears as a separate item within the search result. In NEXIS and NYTO, an article appears to a user without the graphics, formatting, or other articles with which the article was initially published. In GPO, the article appears with the other materials published on the same page or pages, but without any material published on other pages of the original periodical. In either circumstance, we cannot see how the Database perceptibly reproduces and distributes the article "as part of" either the original edition or a "revision" of that edition.

One might view the articles as parts of a new compendium—namely, the entirety of works in the Database. In that compendium, each edition of each periodical represents only a miniscule fraction of the ever-expanding Database. The Database no more constitutes a "revision" of each constituent edition than a 400-page novel quoting a sonnet in passing would represent a "revision" of that poem. "Revision" denotes a new "version," and a version is, in this setting, a "distinct form of something regarded by its creator or others as one work." Webster's Third New International Dictionary 1944, 2545 (1976). The massive whole of the Database is not recognizable as a new version of its every small part.

Alternatively, one could view the Articles in the Databases "as part of" no larger work at all, but simply as individual articles presented individually. That each article bears marks of its origin in a particular periodical (less vivid marks in NEXIS and NYTO, more vivid marks in GPO) suggests the article was *previously* part of that periodical. But the markings do not mean the article is *currently* reproduced or distributed as part of the periodical. The Databases' reproduction and distribution of individual Articles—simply *as*

individual Articles—would invade the core of the Authors' exclusive rights under § 106.[9]

The Publishers press an analogy between the Databases, on the one hand, and microfilm and microfiche, on the other. We find the analogy wanting. Microforms typically contain continuous photographic reproductions of a periodical in the medium of miniaturized film. Accordingly, articles appear on the microforms, writ very small, in precisely the position in which the articles appeared in the newspaper. The Times, for example, printed the beginning of Blakely's "Remembering Jane" Article on page 26 of the Magazine in the September 23, 1990, edition; the microfilm version of the Times reproduces that same Article on film in the very same position, within a film reproduction of the entire Magazine, in turn within a reproduction of the entire September 23, 1990, edition. True, the microfilm roll contains multiple editions, and the microfilm user can adjust the machine lens to focus only on the Article, to the exclusion of surrounding material. Nonetheless, the user first encounters the Article in context. In the Databases, by contrast, the Articles appear disconnected from their original context. In NEXIS and NYTO, the user sees the "Jane" Article apart even from the remainder of page 26. In GPO, the user sees the Article within the context of page 26, but clear of the context of page 25 or page 27, the rest of the Magazine, or the remainder of the day's newspaper. In short, unlike microforms, the Databases do not perceptibly reproduce articles as part of the

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[9] The dissenting opinion takes as its starting point "what is sent from the New York Times to the Electronic Databases." See *post*, at 512–516. This case, however, is not ultimately about what is sent between Publishers in an intermediate step of Database production; it is about what is presented to the general public in the Databases. See *supra*, at 499–500. Those Databases simply cannot bear characterization as a "revision" of any one periodical edition. We would reach the same conclusion if the Times sent intact newspapers to the Electronic Publishers.

collective work to which the author contributed or as part of any "revision" thereof.[10]

Invoking the concept of "media neutrality," the Publishers urge that the "transfer of a work between media" does not "alte[r] the character of" that work for copyright purposes. Brief for Petitioners 23. That is indeed true. See 17 U. S. C. § 102(a) (copyright protection subsists in original works "fixed in any tangible medium of expression"). But unlike the conversion of newsprint to microfilm, the transfer of articles to the Databases does not represent a mere conversion of intact periodicals (or revisions of periodicals) from one medium to another. The Databases offer users individual articles, not intact periodicals. In this case, media neutrality should protect the Authors' rights in the individual Articles to the extent those Articles are now presented individually, outside the collective work context, within the Databases' new media.[11]

For the purpose at hand—determining whether the Authors' copyrights have been infringed—an analogy to an

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[10] The Court of Appeals concluded NEXIS was infringing partly because that Database did "almost nothing to preserve the copyrightable aspects of the [Print] Publishers' collective works," *i. e.*, their original "selection, coordination, and arrangement." 206 F. 3d 161, 168 (CA2 1999). We do not pass on this issue. It suffices to hold that the Databases do not contain "revisions" of the Print Publishers' works "as part of" which the Articles are reproduced and distributed.

[11] The dissenting opinion apparently concludes that, under the banner of "media neutrality," a copy of a collective work, even when considerably changed, must constitute a "revision" of that collective work so long as the changes were "necessitated by the . . . medium." *Post*, at 514. We lack the dissent's confidence that the current form of the Databases is entirely attributable to the nature of the electronic media, rather than the nature of the economic market served by the Databases. In any case, we see no grounding in § 201(c) for a "medium-driven" necessity defense, *post*, at 514, n. 11, to the Authors' infringement claims. Furthermore, it bears reminder here and throughout that these Publishers and all others can protect their interests by private contractual arrangement.

imaginary library may be instructive.[12] Rather than maintaining intact editions of periodicals, the library would contain separate copies of each article. Perhaps these copies would exactly reproduce the periodical pages from which the articles derive (if the model is GPO); perhaps the copies would contain only typescript characters, but still indicate the original periodical's name and date, as well as the article's headline and page number (if the model is NEXIS or NYTO). The library would store the folders containing the articles in a file room, indexed based on diverse criteria, and containing articles from vast numbers of editions. In response to patron requests, an inhumanly speedy librarian would search the room and provide copies of the articles matching patron-specified criteria.

Viewing this strange library, one could not, consistent with ordinary English usage, characterize the articles "as part of" a "revision" of the editions in which the articles first appeared. In substance, however, the Databases differ from the file room only to the extent they aggregate articles in electronic packages (the LEXIS/NEXIS central discs or UMI CD–ROMs), while the file room stores articles in spatially separate files. The crucial fact is that the Databases, like the hypothetical library, store and retrieve articles separately within a vast domain of diverse texts. Such a storage and retrieval system effectively overrides the Authors' ex-

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[12] The Publishers have frequently referred to their products as "electronic libraries." We need not decide whether the Databases come within the legal coverage of the term "libraries" as used in the Copyright Act. For even if the Databases are "libraries," the Copyright Act's special authorizations for libraries do not cover the Databases' reproductions. See, *e. g.*, 17 U. S. C. § 108(a)(1) (reproduction authorized "without any purpose of direct or indirect commercial advantage"); § 108(b) (1994 ed., Supp. V) (reproduction authorized "solely for purposes of preservation and security or for deposit for research use"); § 108(c) (1994 ed., Supp. V) (reproduction "solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, or if the existing format in which the work is stored has become obsolete").

clusive right to control the individual reproduction and distribution of each Article, 17 U. S. C. §§ 106(1), (3). Cf. *Ryan* v. *Carl Corp.*, 23 F. Supp. 2d 1146 (ND Cal. 1998) (holding copy shop in violation of § 201(c)).

The Publishers claim the protection of § 201(c) because users can manipulate the Databases to generate search results consisting entirely of articles from a particular periodical edition. By this logic, § 201(c) would cover the hypothetical library if, in response to a request, that library's expert staff assembled all of the articles from a particular periodical edition. However, the fact that a third party can manipulate a database to produce a noninfringing document does not mean the database is not infringing. Under § 201(c), the question is not whether a user can generate a revision of a collective work from a database, but whether the database itself perceptibly presents the author's contribution as part of a revision of the collective work. That result is not accomplished by these Databases.

The Publishers finally invoke *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U. S. 417 (1984). That decision, however, does not genuinely aid their argument. *Sony* held that the "sale of copying equipment" does not constitute contributory infringement if the equipment is "capable of substantial noninfringing uses." *Id.*, at 442. The Publishers suggest that their Databases could be liable only under a theory of contributory infringement, based on end-user conduct, which the Authors did not plead. The Electronic Publishers, however, are not merely selling "equipment"; they are selling copies of the Articles. And, as we have explained, it is the copies themselves, without any manipulation by users, that fall outside the scope of the § 201(c) privilege.

IV

The Publishers warn that a ruling for the Authors will have "devastating" consequences. Brief for Petitioners 49. The Databases, the Publishers note, provide easy access to

complete newspaper texts going back decades. A ruling for the Authors, the Publishers suggest, will punch gaping holes in the electronic record of history. The Publishers' concerns are echoed by several historians, see Brief for Ken Burns et al. as *Amici Curiae*, but discounted by several other historians, see Brief for Ellen Schrecker et al. as *Amici Curiae;* Brief for Authors' Guild, Inc., Jacques Barzun et al. as *Amici Curiae.*

Notwithstanding the dire predictions from some quarters, see also *post*, at 520 (STEVENS, J., dissenting), it hardly follows from today's decision that an injunction against the inclusion of these Articles in the Databases (much less all freelance articles in any databases) must issue. See 17 U. S. C. § 502(a) (court "may" enjoin infringement); *Campbell* v. *Acuff-Rose Music, Inc.*, 510 U. S. 569, 578, n. 10 (1994) (goals of copyright law are "not always best served by automatically granting injunctive relief"). The parties (Authors and Publishers) may enter into an agreement allowing continued electronic reproduction of the Authors' works; they, and if necessary the courts and Congress, may draw on numerous models for distributing copyrighted works and remunerating authors for their distribution. See, *e. g.*, 17 U. S. C. § 118(b); *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U. S. 1, 4–6, 10–12 (1979) (recounting history of blanket music licensing regimes and consent decrees governing their operation).[13] In any event, speculation about

[13] Courts in other nations, applying their domestic copyright laws, have also concluded that Internet or CD–ROM reproduction and distribution of freelancers' works violate the copyrights of freelancers. See, *e. g.*, *Union Syndicale des Journalistes Français* v. *SDV Plurimédia* (T. G. I., Strasbourg, Fr., Feb. 3, 1998), in Lodging of International Federation of Journalists (IFJ) as *Amicus Curiae; S. C. R. L. Central Station* v. *Association Generale des Journalistes Professionnels de Belgique* (CA, Brussels, Belg., 9e ch., Oct. 28, 1997), transl. and ed. in 22 Colum.-VLA J. L. & Arts 195 (1998); *Heg* v. *De Volskrant B. V.* (Dist. Ct., Amsterdam, Neth., Sept. 24, 1997), transl. and ed. in 22 Colum.-VLA J. L. & Arts, at 181. After the French *Plurimédia* decision, the journalists' union and the

future harms is no basis for this Court to shrink authorial rights Congress established in § 201(c). Agreeing with the Court of Appeals that the Publishers are liable for infringement, we leave remedial issues open for initial airing and decision in the District Court.

* * *

We conclude that the Electronic Publishers infringed the Authors' copyrights by reproducing and distributing the Articles in a manner not authorized by the Authors and not privileged by § 201(c). We further conclude that the Print Publishers infringed the Authors' copyrights by authorizing the Electronic Publishers to place the Articles in the Databases and by aiding the Electronic Publishers in that endeavor. We therefore affirm the judgment of the Court of Appeals.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BREYER joins, dissenting.

This case raises an issue of first impression concerning the meaning of the word "revision" as used in § 201(c) of the 1976 revision of the Copyright Act of 1909 (1976 Act). Ironically, the Court today seems unwilling to acknowledge that changes in a collective work far less extensive than those made to prior copyright law by the 1976 "revision" do not merit the same characterization.

To explain my disagreement with the Court's holding, I shall first identify Congress' principal goals in passing the 1976 Act's changes in the prior law with respect to collective works. I will then discuss two analytically separate ques-

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newspaper-defendant entered into an agreement compensating authors for the continued electronic reproduction of their works. See *FR3* v. *Syndicats de Journalistes* (CA, Colmar, Sept. 15, 1998), in Lodging of IFJ as *Amicus Curiae*. In Norway, it has been reported, a similar agreement was reached. See Brief for IFJ as *Amicus Curiae* 18.

tions that are blended together in the Court's discussion of revisions. The first is whether the electronic versions of the collective works created by the owners of the copyright in those works (Print Publishers or publishers) are "revision[s]" of those works within the meaning of 17 U. S. C. § 201(c). In my judgment they definitely are. The second is whether the aggregation by LEXIS/NEXIS and UMI (Electronic Databases) of the revisions with other editions of the same periodical or with other periodicals within a single database changes the equation. I think it does not. Finally, I will consider the implications of broader copyright policy for the issues presented in this case.

I

As the majority correctly observes, prior to 1976, an author's decision to publish her individual article as part of a collective work was a perilous one. Although pre-1976 copyright law recognized the author's copyright in an individual article that was included within a collective work, those rights could be lost if the publisher refused to print the article with a copyright notice in the author's name. 3 M. Nimmer & D. Nimmer, Nimmer on Copyright § 10.01[C][2], p. 10–12 (2000).

This harsh rule was, from the author's point of view, exacerbated by the pre-1976 doctrine of copyright "indivisibility," which prevented an author from assigning only limited publication rights to the publisher of a collective work while holding back all other rights to herself.[1] *Ibid.* The indivisibility of copyright, in combination with the danger of losing copyright protection, put significant pressure on an author seeking to preserve her copyright in the contribution to

[1] Contractual attempts to assign such limited rights were deemed by courts to create mere licenses, such that the failure to accompany the article with an individual copyright in the author's name allowed the article to pass into the public domain. See 3 M. Nimmer & D. Nimmer, Copyright § 10.01[A], p. 10–5; § 10.01[C][2], p. 10–12 (2000).

transfer the entire copyright over to the publisher in trust. See Kaminstein, Divisibility of Copyrights, Study No. 11, in Copyright Law Revision Studies Nos. 11–13, prepared for the Senate Committee on the Judiciary, 86th Cong., 2d Sess., 18–22 (1960) (hereinafter Kaminstein).[2] Such authors were often at the mercy of publishers when they tried to reclaim their copyright. *Id.*, at 21.[3]

The 1976 Act's extensive revisions of the copyright law had two principal goals with respect to the rights of free-lance authors whose writings appeared as part of larger collective works. First, as the legislative history of § 201(c) unambiguously reveals, one of its most significant aims was to "preserve the author's copyright in a contribution even if the contribution does not bear a separate notice in the author's name, and without requiring any unqualified transfer of rights to the owner of the collective work." H. R. Rep. No. 94–1476, p. 122 (1976) (hereinafter H. R. Rep.) (discussing the purpose of § 201(c)). Indeed, § 404(a) states that "a single notice applicable to the collective work as a whole is sufficient" to protect the author's rights.

The second significant change effected by the 1976 Act clarified the scope of the privilege granted to the publisher of a collective work. While pre-1976 law had the effect of encouraging an author to transfer her *entire* copyright to the

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[2] Cf. *Goodis* v. *United Artists Television, Inc.*, 425 F. 2d 397 (CA2 1970) (creating a legal fiction in which the publisher to whom an author gave first publication rights was considered the legal owner of the author's copyright, which the publisher was deemed to hold in trust for the "beneficial owner," the author).

[3] "Usually, publishers are perfectly willing to return copyright to the author, at least with respect to everything except enumerated serial or reprint rights. There have been allegations that smaller publishers sometimes believe that they are entitled to share in the subsidiary rights and refuse to reassign, or insist upon sharing part of the profits of [the] sales to motion picture, television or dramatic users. In these cases, the author must undertake the burden of proving his contract with the publisher and demonstrating his capacity to sue." Kaminstein 21.

publisher of a collective work, § 201(c) creates the opposite incentive, stating that, absent some agreement to the contrary, the publisher acquires from the author only "the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series."[4] Congress intended this limitation on what the author is presumed to give away primarily to keep publishers from "revis[ing] the contribution itself or includ[ing] it in a new anthology or an *entirely different magazine or other collective work*." H. R. Rep. 122–123.[5]

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[4] Respondents Garson and Robbins argue that the § 201(c) privilege is completely nontransferable. See Brief for Respondents Garson et al. 26–29. The District Court properly rejected this argument, see 972 F. Supp. 804, 815–816 (SDNY 1997), which, in my view, is supported by neither the text nor the legislative history of § 201(c). Publishers obviously cannot assign their publication privilege to another publisher such that the author's work appears in a wholly different collective work, but nothing in § 201(c) clearly prohibits a publisher from merely farming out the mundane task of printing or distributing its collective work or its revision of that collective work. Because neither the majority nor the Court of Appeals has reached this issue, however, see *ante*, at 493; 206 F. 3d 161, 165, and n. 2 (CA2 2000), I will not address it further.

[5] As the District Court observed, representatives of authors had objected to an earlier draft of the 1976 Act that might have been read to give publishers the right to change the text of the contributions. That version gave publishers the privilege to print the individual article "'as part of that particular collective work and any revisions of it.'" 972 F. Supp., at 819. Harriet Pilpel, "a prominent author representative," expressed the following concern:

"'I have but one question with reference to the wording, and that is with respect to the wording at the end of subsection (c) '. . . and any revisions of it.' If that means 'any revision of the collective work' in terms of changing the contributions, or their order, or including different contributions, obviously the magazine writers and photographers would not object. But there is an implication, or at least an ambiguity, that somehow the owner of the collective work has a right to make revisions in the contributions to the collective work. This is not and should not be the law, and consequently I suggest that the wording at the end of subsection (c) be changed to make that absolutely clear.'" 1964 Revision Bill with Discus-

The majority is surely correct that the 1976 Act's new approach to collective works was an attempt to "'clarify and improve the . . . confused and frequently unfair legal situation'" that existed under the prior regime. *Id.*, at 122. It is also undoubtedly true that the drafters of the 1976 Act hoped to "enhance the author's position vis-à-vis the patron." *Ante*, at 495, n. 3. It does not follow, however, that Congress' efforts to "preserve the author's copyright in a contribution," H. R. Rep. 122, can *only* be honored by a finding in favor of the respondent authors.

Indeed, the conclusion that the petitioners' actions were lawful is fully consistent with both of Congress' principal goals for collective works in the 1976 Act. First, neither the publication of the collective works by the Print Publishers nor their transfer to the Electronic Databases had any impact on the legal status of the copyrights of the respondents' individual contributions.[6] By virtue of the 1976 Act, respondents remain the owners of the copyright in their individual works. Moreover, petitioners neither modified respondents' individual contributions nor, as I will show in Part II, published them in a "new anthology or an *entirely different magazine or other collective work.*" *Id.*, at 122–123 (emphasis added). Because I do not think it is at all obvious that the decision the majority reaches today is a result clearly intended by the 1976 Congress, I disagree with the Court's conclusion that a ruling in petitioners' favor

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sions and Comments, 89th Cong., 1st Sess., pt. 5, p. 9 (H. Comm. Print 1965), quoted in 972 F. Supp., at 819.

[6] Nor is the majority correct that, even if respondents retained copyright in their individual articles, the conclusion that petitioners could republish their collective works on the Electronic Databases would drain that copyright of value. See *infra*, at 521–522. Even on my view of this case, respondents retain substantial rights over their articles. Only the respondents, for example, could authorize the publication of their articles in different periodicals or in new topical anthologies wholly apart from the context of the original collective works in which their articles appeared.

would "shrink authorial rights" that "*Congress* [has] established." *Ante*, at 506 (emphasis added).

II

Not only is petitioners' position consistent with Congress' general goals in the 1976 Act, it is also consistent with the text of § 201(c). That provision allows the publisher of a collective work to "reproduc[e] and distribut[e] the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series." The central question in this case, then, is whether petitioners are correct when they argue that publication of the respondents' articles in the various Electronic Databases at issue in this case is nothing more than "reproduc[tion] and distribut[ion] [of] the contribution as part of . . . revision[s] of [the original] collective work[s]" in which respondents' articles appeared. I agree with petitioners that neither the conversion of the Print Publishers' collective works from printed to electronic form, nor the transmission of those electronic versions of the collective works to the Electronic Databases, nor even the actions of the Electronic Databases once they receive those electronic versions does anything to deprive those electronic versions of their status as mere "revision[s]" of the original collective works.

A proper analysis of this case benefits from an incremental approach. Accordingly, I begin by discussing an issue the majority largely ignores: whether a collection of articles from a single edition of the New York Times (*i. e.*, the batch of files the Print Publishers periodically send to the Electronic Databases) constitutes a "revision" of an individual edition of the paper. In other words, does a single article within such a collection exist as "part of" a "revision"? Like the majority, I believe that the crucial inquiry is whether the article appears within the "context" of the original collective work. *Ante*, at 502. But this question simply raises the further issue of precisely how much "context" is enough.

The record indicates that what is sent from the New York Times to the Electronic Databases (with the exception of General Periodicals OnDisc (GPO)) is simply a collection of ASCII text files representing the editorial content of the New York Times for a particular day.[7] App. 73a. Each individual ASCII file contains the text of a single article as well as additional coding intended to help readers identify the context in which the article originally appeared and to facilitate database searches. Thus, for example, to the original text of an article, the New York Times adds information on the article's "headline, byline and title," "the section of the paper in which the article had originally appeared," and "the page in the paper or periodical on which the article had first appeared." *Id.*, at 75a–76a.[8]

I see no compelling reason why a collection of files corresponding to a single edition of the New York Times, standing alone, cannot constitute a "revision" of that day's New York Times. It might be argued, as respondents appear to do, that the presentation of each article within its own electronic file makes it impossible to claim that the collection of files as a whole amounts to a "revision." Brief for Respondents Tasini et al. 34. But the conversion of the text of the overall collective work into separate electronic files should not, by itself, decide the question. After all, one of the hallmarks of copyright policy, as the majority recognizes, *ante*, at 502, is the principle of media neutrality. See H. R. Rep. 53.

No one doubts that the New York Times has the right to reprint its issues in Braille, in a foreign language, or in

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[7] ASCII (American Standard Code for Information Interchange) is a standard means for storing textual data. It assigns a unique binary code for each letter of the alphabet, as well as for numbers, punctuation, and other characters. It cannot be used to convey graphical information. See C. Mackenzie, Coded Character Sets: History and Development 211–213 (1980).

[8] Substantially the same process was used by the other Print Publishers to prepare their files for electronic publication. App. 74a.

microform, even though such revisions might look and feel quite different from the original. Such differences, however, would largely result from the different medium being employed. Similarly, the decision to convert the single collective work newspaper into a collection of individual ASCII files can be explained as little more than a decision that reflects the different nature of the electronic medium. Just as the paper version of the New York Times is divided into "sections" and "pages" in order to facilitate the reader's navigation and manipulation of large batches of newsprint, so too the decision to subdivide the electronic version of that collective work into individual article files facilitates the reader's use of the electronic information. The barebones nature of ASCII text would make trying to wade through a single ASCII file containing the entire content of a single edition of the New York Times an exercise in frustration.[9]

Although the Court does not separately discuss the question whether the groups of files that the New York Times sends to the Electronic Databases constitute "revision[s]," its reasoning strongly suggests that it would not accept such a characterization. The majority, for example, places significant emphasis on the differences between the various Electronic Databases and microform, a medium that admittedly qualifies as a revision under § 201(c).[10] As with the conversion of individual editions into collections of separate article files, however, many of the differences between the

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[9] An ASCII version of the October 31, 2000, New York Times, which contains 287 articles, would fill over 500 printed pages. Conversely, in the case of graphical products like GPO, the demands that memory-intensive graphics files can place on underpowered computers make it appropriate for electronic publishers to divide the larger collective work into manageably sized subfiles. The individual article is the logical unit. The GPO version of the April 7, 1996, New York Times Magazine, for example, would demand in the neighborhood of 200 megabytes of memory if stored as a single file, whereas individual article files range from 4 to 22 megabytes, depending on the length of the article.

[10] See Brief for Respondents Garson et al. 4–5, n. 3.

electronic versions and microform are necessitated by the electronic medium. The Court therefore appears to back away from principles of media neutrality when it implicitly criticizes ASCII-text files for their inability to reproduce "Remembering Jane" "in the very same position, within a film reproduction of the entire Magazine, in turn within a reproduction of the entire September 23, 1990, edition." *Ante*, at 501.[11]

In contrast, I think that a proper respect for media neutrality suggests that the New York Times, reproduced as a collection of individual ASCII files, should be treated as a "revision" of the original edition, as long as each article explicitly refers to the original collective work and as long as substantially the rest of the collective work is, at the same time, readily accessible to the reader of the individual file. In this case, no one disputes that the first pieces of information a user sees when looking at an individual ASCII article file are the name of the publication in which the article appeared, the edition of that publication, and the location of the article within that edition. I agree with the majority that such labeling alone is insufficient to establish that the individual file exists as "part of" a revision of the original collective work. See *ante*, at 500–501. But such labeling is not all there is in the group of files sent to the Electronic Databases.

In addition to the labels, the batch of electronic files contains the entire editorial content of the original edition of the New York Times for that day. That is, while I might agree that a single article, standing alone, even when coded with identifying information (*e. g.*, publication, edition date,

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[11] The majority's reliance on the fact that the GPO user cannot "flip" the page to see material published on other pages, *ante*, at 491, n. 2, and that the text database articles "appear disconnected from their original context," *ante*, at 501, appears to be nothing more than a criticism of Electronic Databases' medium-driven decision to break down the periodicals it contains into smaller, less unwieldy article units. See n. 9, *supra*.

headline, etc.), should not be characterized as a "part of" a larger collective work, I would not say the same about an individual article existing as "part of" a collection of articles *containing all the editorial content of that day's New York Times.* This is all the more true because, as the District Court correctly noted, it is the Print Publishers' *selection* process, the editorial process by which the staff of the New York Times, for example, decides which articles will be included in "All the News That's Fit to Print," that is the most important creative element they contribute to the collective works they publish. 972 F. Supp. 804, 823 (SDNY 1997).[12] While such superficial features as page placement and column width are lost in ASCII format, the Print Publishers' all-important editorial selection is wholly preserved in the collection of individual article files sent to the Electronic Databases.

To see why an electronic version of the New York Times made up of a group of individual ASCII article files, standing alone, may be considered a § 201(c) revision, suppose that, instead of transmitting to NEXIS the articles making up a particular day's edition, the New York Times saves all of the individual files on a single floppy disk, labels that disk "New York Times, October 31, 2000," and sells copies of the disk to users as the electronic version of that day's New York Times. The disk reproduces the creative, editorial selection of that edition of the New York Times. The reader, after all, has at his fingertips substantially all of the relevant content of the October 31 edition of the collective work. Moreover, each individual article makes explicit reference to that selection by including tags that remind the reader that it is a part of the New York Times for October 31, 2000. Such a disk might well constitute "that particular collective work"; it would surely qualify as a "revision" of the original collec-

[12] "*The New York Times* perhaps even represents the paradigm, the epitome of a publication in which selection alone reflects sufficient originality to merit copyright protection." 972 F. Supp., at 823.

tive work. Yet all the features identified as essential by the majority and by the respondents would still be lacking. An individual looking at one of the articles contained on the disk would still see none of the original formatting context and would still be unable to flip the page.

Once one accepts the premise that a disk containing all the files from the October 31, 2000, New York Times can constitute a "revision," there is no reason to treat any differently the same set of files, stored in a folder on the hard disk of a computer at the New York Times. Thus, at least before it is republished by the Electronic Databases, the collection of files that the New York Times transmits to them constitutes a revision, in electronic form, of a particular edition of the New York Times.

III

The next question, then, is whether anything that the Electronic Databases do to the transmitted "revision" strips it of that status. The heart of the Court's reasoning in this respect, as I understand it, is that, once received and processed by Electronic Databases, the data transmitted by the New York Times cannot be viewed as "revisions" within the meaning of § 201(c) because of the way that data is stored and made available to the public by those Databases. First, the Court points to the fact that "the three Databases present articles to users clear of the context provided either by the original periodical editions or by any revision of those editions." *Ante*, at 499. I have already addressed these formatting concerns. Second, and not wholly unrelated to the first point, however, the Court appears to think that the commingling of my hypothetical collection of ASCII article files from the October 31, 2000, New York Times with similar collections of files from other editions of the New York Times (or from other periodicals) within one database would deprive that collection of revision status. See *ante*, at 501, n. 9. Even if my imaginary floppy disk could, in isolation, be considered a revision, the majority might

say, that status would be lost if the floppy disk were to contain, not only the files from the October 31, 2000, New York Times, but also from the New York Times for every other day in 2000 (and other years) and from hundreds of other periodicals. I disagree.

If my hypothetical October 31, 2000, floppy disk can be a revision, I do not see why the inclusion of other editions and other periodicals is any more significant than the placement of a single edition of the New York Times in a large public library or in a bookstore. Each individual file still reminds the reader that he is viewing "part of" a particular collective work. And the *entire* editorial content of that work still exists at the reader's fingertips.[13]

It is true that, once the revision of the October 31, 2000, New York Times is surrounded by the additional content, it can be conceptualized as existing as part of an even larger collective work (*e. g.*, the entire NEXIS database). See *ante*, at 500. The question then becomes whether this ability to conceive of a revision of a collective work as existing within a larger "collective work" changes the status of the original revision. Section 201(c)'s requirement that the article be published only as "part of . . . any revision of *that collective work*" does not compel any particular answer to that question. A microfilm of the New York Times for October 31, 2000, does not cease to be a revision of that individual collective work simply because it is stored on the same roll of film as other editions of the Times or on a library shelf containing hundreds of other microfilm periodicals. Nor does § 201(c) compel the counterintuitive conclusion that the microfilm version of the Times would cease to be a revision simply because its publishers might choose to sell it on rolls of film that contained a year's editions of both the New York Times *and* the Herald-Tribune. Similarly, the placement of

[13] In NEXIS, for example, the reader can gather all the content of the October 31, 2000, New York Times by conducting the following simple search in the correct "library": "date (is 10/31/2000)."

our hypothetical electronic revision of the October 31, 2000, New York Times within a larger electronic database does nothing to alter either the nature of our original electronic revision or the relationship between that revision and the individual articles that exist as "part of" it.

Finally, the mere fact that an individual user may either view or print copies of individual articles stored on the Electronic Databases does not change the nature of the revisions contained within those databases. The same media-specific necessities that allow the publishers to store and make available the original collective work as a collection of individual digital files make it reasonable for the Electronic Databases to enable the user to download or print only those files in which the user has a particular interest. But this is no different from microfilm. Just as nothing intrinsic in the nature of microfilm dictates to a user how much or how little of a microform edition of the New York Times she must copy, nothing intrinsic in the Electronic Databases dictates to a user how much (or how little) of a particular edition of the New York Times to view or print. It is up to the user in each instance to decide whether to employ the publisher's product in a manner that infringes either the publisher's or the author's copyright. And to the extent that the user's decision to make a copy of a particular article violates the author's copyright in that article, such infringing third-party behavior should not be attributed to the database.[14] See *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U. S. 417, 434 (1984).

IV

My reading of "revision," as encompassing products like the Electronic Databases, is not the only possible answer to

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[14] The majority finds that NEXIS infringes by "cop[ying]" and "distribut[ing]" copies of respondents' articles to the public. Perhaps it would be more accurate to say that NEXIS makes it possible for *users* to make and distribute copies. In any event, the Court has wisely declined to reach the question whether the Electronic Databases publicly "display" the articles within the meaning of § 106. *Ante*, at 498, and n. 8.

the complex questions presented by this case. It is, nevertheless, one that is consistent with the statutory text and entirely faithful to the statute's purposes. Respect for the policies motivating its enactment, to which I now turn, makes it wrong for the Court to reject this reading of § 201(c).

It is likely that the Congress that enacted the 1976 revision of the law of copyright did not anticipate the developments that occurred in the 1980's which gave rise to the practices challenged in this litigation. See Miller, Copyright Protection for Computer Programs, Databases, and Computer-Generated Works: Is Anything New Since CONTU?, 106 Harv. L. Rev. 977, 979 (1993) (in 1976, "Congress . . . decided to avoid grappling with technological issues that obviously required more study than the legislative process was then willing to give them").[15] Thus, in resolving ambiguities in the relevant text of the statute, we should be mindful of the policies underlying copyright law.

Macaulay wrote that copyright is "a tax on readers for the purpose of giving a bounty to writers." T. Macaulay, Speeches on Copyright 11 (A. Thorndike ed. 1915). That tax restricts the dissemination of writings, but only insofar as necessary to encourage their production, the bounty's basic objective. See U. S. Const., Art. I, § 8, cl. 8. In other words, "[t]he primary purpose of copyright is not to reward the author, but is rather to secure 'the general benefits derived by the public from the labors of authors.'" 1 M. Nimmer & D. Nimmer, Copyright § 1.03[A] (2000) (quoting *Fox Film Corp.* v. *Doyal*, 286 U. S. 123, 127 (1932)); see also Breyer, The Uneasy Case for Copyright: A Study of

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[15] See also H. R. Rep. 116. In the quarter century since the 1976 Act became law, "the databases [in existence] have grown by a factor of 39 . . . . In 1975, the 301 databases in existence contained about 52 million records. The 11,681 databases in 1999 contained nearly 12.86 billion records for a growth by a factor of 242." Williams, Highlights of the Online Database Industry and the Internet: 2000, in Proceedings of the 21st Annual National Online Meeting 1 (M. Williams ed. 2000).

Copyright in Books, Photocopies, and Computer Programs, 84 Harv. L. Rev. 281, 282 (1970) (discussing the twin goals of copyright law—protecting the reader's desire for access to ideas and providing incentives for authors to produce them). The majority's decision today unnecessarily subverts this fundamental goal of copyright law in favor of a narrow focus on "authorial rights." *Ante*, at 506. Although the desire to protect such rights is certainly a laudable sentiment,[16] copyright law demands that "private motivation must ultimately serve the cause of promoting *broad public availability* of literature, music, and the other arts." *Twentieth Century Music Corp.* v. *Aiken*, 422 U. S. 151, 156 (1975) (emphasis added).

The majority discounts the effect its decision will have on the availability of comprehensive digital databases, *ante*, at 504–505, but I am not as confident. As petitioners' *amici* have persuasively argued, the difficulties of locating individual freelance authors and the potential of exposure to statutory damages may well have the effect of forcing electronic archives to purge freelance pieces from their databases.[17] "The omission of these materials from electronic collections, for any reason on a large scale or even an occasional basis, undermines the principal benefits that electronic archives offer historians—efficiency, accuracy and comprehensiveness."[18] Brief for Ken Burns et al. as *Amici Curiae* 13.

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[16] But see Breyer, The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs, 84 Harv. L. Rev. 281, 286–290 (1970) (criticizing the use of copyright as a means of protecting authorial rights).

[17] Indeed, today's decision in favor of authors may have the perverse consequence of encouraging publishers to demand from freelancers a complete transfer of copyright. If that turns out to be the case, we will have come full circle back to the pre-1976 situation.

[18] If the problem is as important as *amici* contend, congressional action may ultimately be necessary to preserve present databases in their entirety. At the least, Congress can determine the nature and scope of the

Moreover, it is far from clear that my position even deprives authors of much of anything (with the exception of perhaps the retrospective statutory damages that may well result from their victory today).[19] Imagine, for example, that one of the contributions at issue in this case were a copyrighted version of John Keats' Ode on a Grecian Urn, published on page 29 of our hypothetical October 31, 2000, New York Times. Even under my reading of § 201(c), Keats retains valuable copyright protection. No matter how well received his ode might be, it is unlikely—although admittedly possible—that it could be marketed as a stand-alone work of art. The ode, however, would be an obvious candidate for inclusion in an anthology of works by romantic poets, in a collection of poems by the same author, or even in "a 400-page novel quoting a [poem] in passing," *ante*, at 500. The author's copyright would protect his right to compensation for any such use. Cf. *Stewart* v. *Abend*, 495 U. S. 207, 228 (1990) (discussing the value to authors of derivative works). Moreover, the value of the ode surely would be enhanced, not decreased, by the accessibility and readership of the October 31, 2000, edition of the New York Times. The ready availability of that edition, both at the time of its first publication and subsequently in libraries and electronic databases, would be a benefit, not an injury, to most authors. Keats would benefit from the poem's continued availability to database users, by his identification as the author of the piece, and by the database's indication of the fact that the poem first appeared in a prestigious periodical on a certain date. He would not care one whit whether the database in-

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problem and fashion an appropriate licensing remedy far more easily than can courts. Cf. 17 U. S. C. § 108(d)(1).

[19] It is important to remember that the prospect of payment by the Print Publishers was sufficient to stimulate each petitioner to create his or her part of the collective works, presumably with full awareness of its intended inclusion in the Electronic Databases.

dicated the formatting context of the page on which the poem appeared. What is overwhelmingly clear is that maximizing the readership of the ode would *enhance* the value of his remaining copyright uses.

Nor is it clear that Keats will gain any prospective benefits from a victory in this case. As counsel for petitioners represented at oral argument, since 1995, the New York Times has required freelance authors to grant the Times "electronic rights" to articles. Tr. of Oral Arg. 7. And the inclusion of such a term has had *no effect* on the compensation authors receive. See *ibid.* This is understandable because, even if one accepts the majority's characterization of the Electronic Databases as collections of freestanding articles, demand for databases like NEXIS probably does not reflect a "demand for a freelance article standing alone," *ante*, at 497, to which the publishers are greedily helping themselves. Cf. *Ryan* v. *Carl Corp.*, 23 F. Supp. 2d 1146, 1150–1151 (ND Cal. 1998) ("[T]he value added by the publisher to a reproduced article is significant").

Instead, it seems far more likely that demand for the Electronic Databases reflects demand for a product that will provide a user with the means to quickly search through scores of complete periodicals. The comments of historian Douglas Brinkley are instructive in this respect:

> "'As an historian, when I want to write a biography, if I'm going to write a biography of Bill Clinton, the first thing I would do would be to index *The New York Times*. I would work through [the] microfiche and get any time Bill Clinton's name ever appeared in *The New York Times*. I'd get a copy of that. So, you'd have boxes of files. So for each month, here's Clinton this month. . . . You then would fill that in with . . . other obvious books or articles from *Foreign Affairs* or *Foreign Policy* or *The New Yorker*, or the like and you'd start getting your first biography of Bill Clinton.'" Panel Discussion: The Observer's View (D. Brinkley, M.

Frankel, H. Sidey), White House Historical Association (Nov. 16, 2000) (C–SPAN Archives No. 160577) (quoted in Brief for Ken Burns et al. as *Amici Curiae* 17).

Users like Douglas Brinkley do not go to NEXIS because it contains a score of individual articles by Jonathan Tasini.[20] Rather, they go to NEXIS because it contains a comprehensive and easily searchable collection of (intact) periodicals.

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[20] Even assuming, as the majority does, see *ante*, at 497–498, n. 6, that the existence of databases like NEXIS may have some adverse effect on the market for stand-alone compilations of authors' contributions to collective works, I fail to see how, on that basis, electronic databases are any different from microform. With respect to effects on the market for stand-alone works, the only difference between the two products is the speed with which digital technology allows NEXIS users to retrieve the desired data. But the 1976 Act was not intended to bar the use of every conceivable innovation in technology that might "'giv[e] publishers [new] opportunities to exploit authors' works.'" *Ante*, at 498, n. 6. Copyright law is not an insurance policy for authors, but a carefully struck balance between the need to create incentives for authorship and the interests of society in the broad accessibility of ideas. See U. S. Const., Art. I, § 8, cl. 8 (in order to promote production, Congress should allow authors and inventors to enjoy "exclusive Right[s]," but only "for *limited* Times" (emphasis added)); see also *supra*, at 519–520. The majority's focus on authorial incentive comes at the expense of the equally important (at least from the perspective of copyright policy) public interest.

Moreover, the majority's single-minded focus on "authorial rights" appears to lead it to believe that, because *some* authors may benefit from its decision, that decision must be the one intended by Congress. It cites the "'economic philosophy behind the [Copyright Clause]'" as consistent with its view that Congress adjusted "the author/publisher balance" precisely to avoid the types of uses embodied in the Electronic Databases. See *ante*, at 495, n. 3. But, as I have already argued, see *supra*, at 519, there is no indication that Congress ever considered the issue presented in this case. It thus simply begs the question for the majority to argue that the right not to have a work included within the Electronic Databases is an "authorial right" that "*Congress* [has] established," *ante*, at 506 (emphasis added), or that—given Congress' failure clearly to address itself to the question—a decision allowing such inclusion would amount to "*diminish[ing]*" authorial "rights" on the basis of "our conception of their interests," *ante*, at 498, n. 6 (emphasis added).

See *id.*, at 8 ("The efficiency, accuracy, reliability, comprehensiveness and immediacy of access offered by searchable full-text digital archives are but a few of the benefits historians and other researchers have reaped from the advancement in the technology of information").

Because it is likely that Congress did not consider the question raised by this case when drafting § 201(c), because I think the District Court's reading of that provision is reasonable and consistent with the statute's purposes, and because the principal goals of copyright policy are better served by that reading, I would reverse the judgment of the Court of Appeals. The majority is correct that we cannot know in advance the effects of today's decision on the comprehensiveness of electronic databases. We can be fairly certain, however, that it will provide little, if any, benefit to either authors or readers.

Syllabus

LORILLARD TOBACCO CO. ET AL. *v.* REILLY, ATTORNEY GENERAL OF MASSACHUSETTS, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 00–596. Argued April 25, 2001—Decided June 28, 2001*

After the Attorney General of Massachusetts (Attorney General) promulgated comprehensive regulations governing the advertising and sale of cigarettes, smokeless tobacco, and cigars, petitioners, a group of tobacco manufacturers and retailers, filed this suit asserting, among other things, the Supremacy Clause claim that the cigarette advertising regulations are pre-empted by the Federal Cigarette Labeling and Advertising Act (FCLAA), which prescribes mandatory health warnings for cigarette packaging and advertising, 15 U. S. C. § 1333, and pre-empts similar state regulations, § 1334(b); and a claim that the regulations violate the First and Fourteenth Amendments to the Federal Constitution. In large measure, the District Court upheld the regulations. Among its rulings, the court held that restrictions on the location of advertising were not pre-empted by the FCLAA, and that neither the regulations prohibiting outdoor advertising within 1,000 feet of a school or playground nor the sales practices regulations restricting the location and distribution of tobacco products violated the First Amendment. The court ruled, however, that the point-of-sale advertising regulations requiring that indoor advertising be placed no lower than five feet from the floor were invalid because the Attorney General had not provided sufficient justification for that restriction. The First Circuit affirmed the District Court's rulings that the cigarette advertising regulations are not pre-empted by the FCLAA and that the outdoor advertising regulations and the sales practices regulations do not violate the First Amendment under *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, but reversed the lower court's invalidation of the point-of-sale advertising regulations, concluding that the Attorney General is better suited than courts to determine what restrictions are necessary.

Held:

1. The FCLAA pre-empts Massachusetts' regulations governing outdoor and point-of-sale cigarette advertising. Pp. 540–553.

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*Together with No. 00–597, *Altadis U. S. A. Inc., as Successor to Consolidated Cigar Corp. and Havatampa, Inc., et al.* v. *Reilly, Attorney General of Massachusetts, et al.*, also on certiorari to the same court.

Syllabus

(a) The FCLAA's pre-emption provision, § 1334, prohibits (a) requiring cigarette packages to bear any "statement relating to smoking and health, other than the statement required by" § 1333, and (b) any "requirement or prohibition based on smoking and health . . . imposed under state law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with" § 1333. The Court's analysis begins with the statute's language. *Hughes Aircraft Co.* v. *Jacobson*, 525 U. S. 432, 438. The statute's interpretation is aided by considering the predecessor pre-emption provision and the context in which the current language was adopted. See, *e. g.*, *Medtronic, Inc.* v. *Lohr*, 518 U. S. 470, 486. The original provision simply prohibited any "statement relating to smoking and health . . . in the advertising of any cigarettes the packages of which are labeled in conformity with the [Act's] provisions." Without question, the current pre-emption provision's plain language is much broader. *Cipollone* v. *Liggett Group, Inc.*, 505 U. S. 504, 520. Rather than preventing only "statements," the amended provision reaches all "requirement[s] or prohibition[s] . . . imposed under State law." And, although the former statute reached only statements "in the advertising," the current provision governs "with respect to the advertising or promotion" of cigarettes. At the same time that Congress expanded the pre-emption provision with respect to the States, it enacted a provision prohibiting cigarette advertising in electronic media altogether. Pp. 540–546.

(b) Congress pre-empted state cigarette advertising regulations like the Attorney General's because they would upset federal legislative choices to require specific warnings and to impose the ban on cigarette advertising in electronic media in order to address concerns about smoking and health. In holding that the FCLAA does not nullify the Massachusetts regulations, the First Circuit concentrated on whether they are "with respect to" advertising and promotion, concluding that the FCLAA only pre-empts regulations of the content of cigarette advertising. The court also reasoned that the regulations are a form of zoning, a traditional area of state power, and, therefore, a presumption against pre-emption applied, see *California Div. of Labor Standards Enforcement* v. *Dillingham Constr., N. A., Inc.*, 519 U. S. 316, 325. This Court rejects the notion that the regulations are not "with respect to" cigarette advertising and promotion. There is no question about an indirect relationship between the Massachusetts regulations and cigarette advertising: The regulations expressly target such advertising. *Id.*, at 324–325. The Attorney General's argument that the regulations are not "based on smoking and health" since they do not involve health-related content, but instead target youth exposure to cigarette advertising, is unpersuasive because, at bottom, the youth exposure concern is

intertwined with the smoking and health concern. Also unavailing is the Attorney General's claim that the regulations are not pre-empted because they govern the location, not the content, of cigarette advertising. The content/location distinction cannot be squared with the pre-emption provision's language, which reaches *all* "requirements" and "prohibitions" "imposed under State law." A distinction between advertising content and location in the FCLAA also cannot be reconciled with Congress' own location-based restriction, which bans advertising in electronic media, but not elsewhere. The Attorney General's assertion that a complete state ban on cigarette advertising would not be pre-empted because Congress did not intend to preclude local control of zoning finds no support in the FCLAA, whose comprehensive warnings, advertising restrictions, and pre-emption provision would make little sense if a State or locality could simply target and ban all cigarette advertising. Pp. 546–551.

(c) The FCLAA's pre-emption provision does not restrict States' and localities' ability to enact generally applicable zoning restrictions on the location and size of advertisements that apply to cigarettes on equal terms with other products, see, *e. g., Metromedia, Inc.* v. *San Diego*, 453 U. S. 490, 507–508, or to regulate conduct as it relates to the sale or use of cigarettes, as by prohibiting cigarette sales to minors, see 42 U. S. C. §§ 300x–26(a)(1), 300x–21, as well as common inchoate offenses that attach to criminal conduct, such as solicitation, conspiracy, and attempt, cf. *Central Hudson, supra,* at 563–564. Pp. 551–552.

(d) Because the issue was not decided below, the Court declines to reach the smokeless tobacco petitioners' argument that, if the outdoor and point-of-sale advertising regulations for cigarettes are pre-empted, then the same regulations for smokeless tobacco must be invalidated because they cannot be severed from the cigarette provisions. P. 553.

2. Massachusetts' outdoor and point-of-sale advertising regulations relating to smokeless tobacco and cigars violate the First Amendment, but the sales practices regulations relating to all three tobacco products are constitutional. Pp. 553–571.

(a) Under *Central Hudson*'s four-part test for analyzing regulations of commercial speech, the Court must determine (1) whether the expression is protected by the First Amendment, (2) whether the asserted governmental interest is substantial, (3) whether the regulation directly advances the governmental interest asserted, and (4) whether it is not more extensive than is necessary to serve that interest. 447 U. S., at 566. Only the last two steps are at issue here. The Attorney General has assumed for summary judgment purposes that the First Amendment protects the speech of petitioners, none of whom contests

the importance of the State's interest in preventing the use of tobacco by minors. The third step of *Central Hudson* requires that the government demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree. *Edenfield* v. *Fane*, 507 U. S. 761, 770–771. The fourth step of *Central Hudson* requires a reasonable fit between the legislature's ends and the means chosen to accomplish those ends, a means narrowly tailored to achieve the desired objective. *E. g.*, *Florida Bar* v. *Went For It, Inc.*, 515 U. S. 618, 632. Pp. 553–556.

(b) The outdoor advertising regulations prohibiting smokeless tobacco or cigar advertising within 1,000 feet of a school or playground violate the First Amendment. Pp. 556–566.

(1) Those regulations satisfy *Central Hudson*'s third step by directly advancing the governmental interest asserted to justify them. The Court's detailed review of the record reveals that the Attorney General has provided ample documentation of the problem with underage use of smokeless tobacco and cigars. In addition, the Court disagrees with petitioners' claim that there is no evidence that preventing targeted advertising campaigns and limiting youth exposure to advertising will decrease underage use of those products. On the record below and in the posture of summary judgment, it cannot be concluded that the Attorney General's decision to regulate smokeless tobacco and cigar advertising in an effort to combat the use of tobacco products by minors was based on mere "speculation and conjecture." *Edenfield*, *supra*, at 770. Pp. 556–561.

(2) Whatever the strength of the Attorney General's evidence to justify the outdoor advertising regulations, however, the regulations do not satisfy *Central Hudson*'s fourth step. Their broad sweep indicates that the Attorney General did not "carefully calculat[e] the costs and benefits associated with the burden on speech imposed." *Cincinnati* v. *Discovery Network, Inc.*, 507 U. S. 410, 417. The record indicates that the regulations prohibit advertising in a substantial portion of Massachusetts' major metropolitan areas; in some areas, they would constitute nearly a complete ban on the communication of truthful information. This substantial geographical reach is compounded by other factors. "Outdoor" advertising includes not only advertising located outside an establishment, but also advertising inside a store if visible from outside. Moreover, the regulations restrict advertisements of any size, and the term advertisement also includes oral statements. The uniformly broad sweep of the geographical limitation and the range of communications restricted demonstrate a lack of tailoring. The governmental interest in preventing underage tobacco use is substantial, and even compelling, but it is no less true that the sale and use of tobacco products by

adults is a legal activity. A speech regulation cannot unduly impinge on the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products. The Attorney General has failed to show that the regulations at issue are not more extensive than necessary. Pp. 561–566.

(c) The regulations prohibiting indoor, point-of-sale advertising of smokeless tobacco and cigars lower than 5 feet from the floor of a retail establishment located within 1,000 feet of a school or playground fail both the third and fourth steps of the *Central Hudson* analysis. The 5-foot rule does not seem to advance the goals of preventing minors from using tobacco products and curbing demand for that activity by limiting youth exposure to advertising. Not all children are less than 5 feet tall, and those who are can look up and take in their surroundings. Nor can the blanket height restriction be construed as a mere regulation of communicative action under *United States* v. *O'Brien*, 391 U. S. 367, since it is not unrelated to expression, see, *e. g.*, *Texas* v. *Johnson*, 491 U. S. 397, 403, but attempts to regulate directly the communicative impact of indoor advertising. Moreover, the restriction does not constitute a reasonable fit with the goal of targeting tobacco advertising that entices children. Although the First Circuit decided that the restriction's burden on speech is very limited, there is no *de minimis* exception for a speech restriction that lacks sufficient tailoring or justification. Pp. 566–567.

(d) Assuming that petitioners have a cognizable speech interest in a particular means of displaying their products, cf. *Cincinnati* v. *Discovery Network, Inc.*, *supra*, at 410, the regulations requiring retailers to place tobacco products behind counters and requiring customers to have contact with a salesperson before they are able to handle such a product withstand First Amendment scrutiny. The State has demonstrated a substantial interest in preventing access to tobacco products by minors and has adopted an appropriately narrow means of advancing that interest. See, *e. g.*, *O'Brien*, *supra*, at 382. Because unattended displays of such products present an opportunity for access without the proper age verification required by law, the State prohibits self-service and other displays that would allow an individual to obtain tobacco without direct contact with a salesperson. It is clear that the regulations leave open ample communication channels. They do not significantly impede adult access to tobacco products, and retailers have other means of exercising any cognizable speech interest in the presentation of their products. The Court presumes that vendors may place empty tobacco packaging on open display, and display actual tobacco products so long as that display is only accessible to sales personnel. As for cigars, there is no indication that a customer is unable to examine a cigar prior to pur-

chase, so long as that examination takes place through a salesperson. Pp. 567–570.

(e) The Court declines to address the cigar petitioners' First Amendment challenge to a regulation prohibiting sampling or promotional giveaways of cigars and little cigars. That claim was not sufficiently briefed and argued before this Court. Pp. 570–571.

218 F. 3d 30, affirmed in part, reversed in part, and remanded.

O'CONNOR, J., delivered the opinion of the Court, Parts I, II–C, and II–D of which were unanimous; Parts III–A, III–C, and III–D of which were joined by REHNQUIST, C. J., and SCALIA, KENNEDY, SOUTER, and THOMAS, JJ.; Part III–B–1 of which was joined by REHNQUIST, C. J., and STEVENS, SOUTER, GINSBURG, and BREYER, JJ.; and Parts II–A, II–B, III–B–2, and IV of which were joined by REHNQUIST, C. J., and SCALIA, KENNEDY, and THOMAS, JJ. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment, in which SCALIA, J., joined, *post*, p. 571. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 572. SOUTER, J., filed an opinion concurring in part and dissenting in part, *post*, p. 590. STEVENS, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which GINSBURG and BREYER, JJ., joined, and in which SOUTER, J., joined as to Part I, *post*, p. 590.

Jeffrey S. Sutton argued the cause for petitioners in No. 00–596. With him on the briefs were *Daniel P. Collins*, *Michael R. Doyen*, *Fred A. Rowley, Jr.*, *Kenneth S. Geller*, *Andrew L. Frey*, *Richard M. Zielinski*, *John L. Strauch*, *Gregory G. Katsas*, *John B. Connarton, Jr.*, *Patricia A. Barald*, and *David H. Remes*. *James V. Kearney* filed a brief for petitioners in No. 00–597. With Mr. Kearney on the brief were *Christopher Harris* and *Richard P. Bress*. *Peter J. McKenna* and *Eric S. Sarner* filed a brief for petitioner U. S. Smokeless Tobacco Company in both cases.

William W. Porter, Assistant Attorney General of the Commonwealth of Massachusetts, argued the cause for respondents in both cases. With him on the brief were *Thomas F. Reilly*, Attorney General, and *Susan Paulson*, Assistant Attorney General.

Acting Solicitor General Underwood argued the cause for the United States as *amicus curiae* urging affirmance.

Counsel

With her on the brief were *Acting Assistant Attorney General Schiffer, Deputy Solicitor General Kneedler, Irving L. Gornstein,* and *Douglas N. Letter.**

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*Briefs of *amici curiae* urging reversal were filed for the American Advertising Federation et al. by *Daniel E. Troy* and *Robin S. Conrad;* for the American Association of Advertising Agencies et al. by *Penelope S. Farthing;* for the Association of National Advertisers, Inc., by *Steven G. Brody, John J. Walsh,* and *Gilbert H. Weil;* for Infinity Outdoor, Inc., et al. by *Floyd Abrams* and *Joel Kurtzberg;* for the National Association of Convenience Stores by *Scott A. Sinder* and *John B. Williams;* for the Newspaper Association of America et al. by *Bruce E. H. Johnson, P. Cameron DeVore, René P. Milam, Steven R. Shapiro, Stuart D. Karle, Robin Bierstedt, Lucy Dalglish,* and *Gregg Leslie;* for the Product Liability Advisory Council, Inc., by *Leslie G. Landau;* and for the Washington Legal Foundation by *Daniel J. Popeo* and *Richard A. Samp.*

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *Seth E. Mermin* and *Corinne Lee Murphy,* Deputy Attorneys General of California, *Bill Lockyer,* Attorney General, *Richard M. Frank,* Chief Assistant Attorney General, *Herschel T. Elkins* and *Dennis Eckhart,* Senior Assistant Attorneys General, *Ronald A. Reiter,* Supervising Deputy Attorney General, and *Robert R. Rigsby,* Corporation Counsel of the District of Columbia, and by the Attorneys General for their respective jurisdictions as follows: *Bruce M. Botelho* of Alaska, *Janet Napolitano* of Arizona, *Mark Pryor* of Arkansas, *Ken Salazar* of Colorado, *Richard Blumenthal* of Connecticut, *Robert A. Butterworth* of Florida, *Earl I. Anzai* of Hawaii, *Alan G. Lance* of Idaho, *Jim Ryan* of Illinois, *Steve Carter* of Indiana, *Tom Miller* of Iowa, *Carla J. Stovall* of Kansas, *Richard P. Ieyoub* of Louisiana, *Steve Rowe* of Maine, *J. Joseph Curran, Jr.,* of Maryland, *Mike Hatch* of Minnesota, *Mike Moore* of Mississippi, *Jeremiah W. Nixon* of Missouri, *Mike McGrath* of Montana, *Frankie Sue Del Papa* of Nevada, *Philip T. McLaughlin* of New Hampshire, *John Farmer* of New Jersey, *Patricia Madrid* of New Mexico, *Eliot Spitzer* of New York, *Wayne Stenehjem* of North Dakota, *Herbert D. Soll* of the Northern Mariana Islands, *Betty D. Montgomery* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Mike Fisher* of Pennsylvania, *Sheldon Whitehouse* of Rhode Island, *Mark Barnett* of South Dakota, *Paul Summers* of Tennessee, *John Cornyn* of Texas, *Mark Shurtleff* of Utah, *William H. Sorrell* of Vermont, *Christine O. Gregoire* of Washington, *Darrel V. McGraw, Jr.,* of West Virginia, and *James E. Doyle* of Wisconsin; for the Cities of Oakland, California, et al. by *Stephen P. Berzon, Michael E. Wall, Lawrence Rosenthal,* and *Benna Ruth Solomon;*

JUSTICE O'CONNOR delivered the opinion of the Court.

In January 1999, the Attorney General of Massachusetts promulgated comprehensive regulations governing the advertising and sale of cigarettes, smokeless tobacco, and cigars. 940 Code of Mass. Regs. §§21.01–21.07, 22.01–22.09 (2000). Petitioners, a group of cigarette, smokeless tobacco, and cigar manufacturers and retailers, filed suit in Federal District Court claiming that the regulations violate federal law and the United States Constitution. In large measure, the District Court determined that the regulations are valid and enforceable. The United States Court of Appeals for the First Circuit affirmed in part and reversed in part, concluding that the regulations are not pre-empted by federal law and do not violate the First Amendment. The first question presented for our review is whether certain cigarette advertising regulations are pre-empted by the Federal Cigarette Labeling and Advertising Act (FCLAA), 79 Stat. 282, as amended, 15 U. S. C. § 1331 *et seq.* The second question presented is whether certain regulations governing the advertising and sale of tobacco products violate the First Amendment.

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for the City of Los Angeles et al. by *Mark E. Haddad, James M. Harris, Joseph R. Guerra,* and *James K. Hahn;* for the City of New York et al. by *Michael D. Hess, Leonard J. Koerner, Elizabeth Susan Natrella, Richard M. Weinberg,* and *Sandra R. Gutman;* for the American Legacy Foundation by *A. Stephen Hut, Jr., John Payton, Patrick J. Carome,* and *Matthew A. Brill;* for the American Medical Association et al. by *Donald W. Garner;* for the National Center for Tobacco-Free Kids et al. by *David Vladeck, Allison M. Zieve, Alan B. Morrison,* and *Matthew L. Myers;* for the National Conference of State Legislatures et al. by *Richard Ruda, James I. Crowley,* and *D. Bruce La Pierre;* and for the Tobacco Control Resource Center, Inc., by *Richard A. Daynard.*

Briefs of *amici curiae* were filed for the State's Attorney of Dupage County, Illinois, et al. by *Richard Hodyl, Jr., Joseph E. Birkett,* and *Nancy J. Wolfe;* and for the American Planning Association by *Randal R. Morrison.*

I

In November 1998, Massachusetts, along with over 40 other States, reached a landmark agreement with major manufacturers in the cigarette industry. The signatory States settled their claims against these companies in exchange for monetary payments and permanent injunctive relief. See App. 253–258 (Outline of Terms for Massachusetts in National Tobacco Settlement); Master Settlement Agreement (Nov. 23, 1998), http://www.naag.org. At the press conference covering Massachusetts' decision to sign the agreement, then-Attorney General Scott Harshbarger announced that as one of his last acts in office, he would create consumer protection regulations to restrict advertising and sales practices for tobacco products. He explained that the regulations were necessary in order to "close holes" in the settlement agreement and "to stop Big Tobacco from recruiting new customers among the children of Massachusetts." App. 251.

In January 1999, pursuant to his authority to prevent unfair or deceptive practices in trade, Mass. Gen. Laws, ch. 93A, § 2 (1997), the Massachusetts Attorney General (Attorney General) promulgated regulations governing the sale and advertisement of cigarettes, smokeless tobacco, and cigars. The purpose of the cigarette and smokeless tobacco regulations is "to eliminate deception and unfairness in the way cigarettes and smokeless tobacco products are marketed, sold and distributed in Massachusetts in order to address the incidence of cigarette smoking and smokeless tobacco use by children under legal age . . . [and] in order to prevent access to such products by underage consumers." 940 Code of Mass. Regs. § 21.01 (2000). The similar purpose of the cigar regulations is "to eliminate deception and unfairness in the way cigars and little cigars are packaged, marketed, sold and distributed in Massachusetts [so that] . . . consumers may be adequately informed about the health

risks associated with cigar smoking, its addictive properties, and the false perception that cigars are a safe alternative to cigarettes . . . [and so that] the incidence of cigar use by children under legal age is addressed . . . in order to prevent access to such products by underage consumers." *Ibid.* The regulations have a broader scope than the master settlement agreement, reaching advertising, sales practices, and members of the tobacco industry not covered by the agreement. The regulations place a variety of restrictions on outdoor advertising, point-of-sale advertising, retail sales transactions, transactions by mail, promotions, sampling of products, and labels for cigars.

The cigarette and smokeless tobacco regulations being challenged before this Court provide:

> "(2) Retail Outlet Sales Practices. Except as otherwise provided in [§ 21.04(4)], it shall be an unfair or deceptive act or practice for any person who sells or distributes cigarettes or smokeless tobacco products through a retail outlet located within Massachusetts to engage in any of the following retail outlet sales practices:
>
> . . . . . .
>
> "(c) Using self-service displays of cigarettes or smokeless tobacco products;
>
> "(d) Failing to place cigarettes and smokeless tobacco products out of the reach of all consumers, and in a location accessible only to outlet personnel." §§ 21.04(2)(c)–(d).
>
> "(5) Advertising Restrictions. Except as provided in [§ 21.04(6)], it shall be an unfair or deceptive act or practice for any manufacturer, distributor or retailer to engage in any of the following practices:
>
> "(a) Outdoor advertising, including advertising in enclosed stadiums and advertising from within a retail establishment that is directed toward or visible from the

outside of the establishment, in any location that is within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school;

"(b) Point-of-sale advertising of cigarettes or smokeless tobacco products any portion of which is placed lower than five feet from the floor of any retail establishment which is located within a one thousand foot radius of any public playground, playground area in a public park, elementary school or secondary school, and which is not an adult-only retail establishment." §§ 21.04(5)(a)–(b).

The cigar regulations that are still at issue provide:

"(1) Retail Sales Practices. Except as otherwise provided in [§ 22.06(4)], it shall be an unfair or deceptive act or practice for any person who sells or distributes cigars or little cigars directly to consumers within Massachusetts to engage in any of the following practices:

"(a) sampling of cigars or little cigars or promotional give-aways of cigars or little cigars." § 21.06(1)(a).

"(2) Retail Outlet Sales Practices. Except as otherwise provided in [§ 22.06(4)], it shall be an unfair or deceptive act or practice for any person who sells or distributes cigars or little cigars through a retail outlet located within Massachusetts to engage in any of the following retail outlet sales practices:

. . . . . .

"(c) Using self-service displays of cigars or little cigars;

"(d) Failing to place cigars and little cigars out of the reach of all consumers, and in a location accessible only to outlet personnel." §§ 22.06(2)(c)–(d).

"(5) Advertising Restrictions. Except as provided in [§ 22.06(6)], it shall be an unfair or deceptive act or practice for any manufacturer, distributor or retailer to engage in any of the following practices:

> "(a) Outdoor advertising of cigars or little cigars, including advertising in enclosed stadiums and advertising from within a retail establishment that is directed toward or visible from the outside of the establishment, in any location within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school;
>
> "(b) Point-of-sale advertising of cigars or little cigars any portion of which is placed lower than five feet from the floor of any retail establishment which is located within a one thousand foot radius of any public playground, playground area in a public park, elementary school or secondary school, and which is not an adult-only retail establishment." §§ 22.06(5)(a)–(b).

The term "advertisement" is defined as:

> "any oral, written, graphic, or pictorial statement or representation, made by, or on behalf of, any person who manufactures, packages, imports for sale, distributes or sells within Massachusetts [tobacco products], the purpose or effect of which is to promote the use or sale of the product. Advertisement includes, without limitation, any picture, logo, symbol, motto, selling message, graphic display, visual image, recognizable color or pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, those used for any brand of [tobacco product]. This includes, without limitation, utilitarian items and permanent or semi-permanent fixtures with such indicia of product identification such as lighting fixtures, awnings, display cases, clocks and door mats, but does not include utilitarian items with a volume of 200 cubic inches or less." §§ 21.03, 22.03.

Before the effective date of the regulations, February 1, 2000, members of the tobacco industry sued the Attorney General in the United States District Court for the District

of Massachusetts. Four cigarette manufacturers (Lorillard Tobacco Company, Brown & Williamson Tobacco Corporation, R. J. Reynolds Tobacco Company, and Philip Morris Incorporated), a maker of smokeless tobacco products (U. S. Smokeless Tobacco Company), and several cigar manufacturers and retailers claimed that many of the regulations violate the Commerce Clause, the Supremacy Clause, the First and Fourteenth Amendments, and Rev. Stat. § 1979, 42 U. S. C. § 1983. The parties sought summary judgment. 76 F. Supp. 2d 124, 127 (1999); 84 F. Supp. 2d 180, 183 (2000).

In its first ruling, the District Court considered the Supremacy Clause claim that the FCLAA, 15 U. S. C. § 1331 *et seq.*, pre-empts the cigarette advertising regulations. 76 F. Supp. 2d, at 128–134. The FCLAA prescribes the health warnings that must appear on packaging and in advertisements for cigarettes. The FCLAA contains a pre-emption provision that prohibits a State from imposing any "requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion of . . . cigarettes." § 1334(b). The FCLAA's pre-emption provision does not cover smokeless tobacco or cigars.

The District Court explained that the central question for purposes of pre-emption is whether the regulations create a predicate legal duty based on smoking and health. The court reasoned that to read the pre-emption provision to proscribe any state advertising regulation enacted due to health concerns about smoking would expand Congress' purpose beyond a reasonable scope and leave States powerless to regulate in the area. The court concluded that restrictions on the location of advertising are not based on smoking and health and thus are not pre-empted by the FCLAA. The District Court also concluded that a provision that permitted retailers to display a black and white "tombstone" sign reading "Tobacco Products Sold Here," 940 Code of Mass. Regs. § 21.04(6) (2000), was pre-empted by the FCLAA.

In a separate ruling, the District Court considered the claim that the Attorney General's regulations violate the First Amendment. 84 F. Supp. 2d, at 183–196. Rejecting petitioners' argument that strict scrutiny should apply, the court applied the four-part test of *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557 (1980), for commercial speech. The court reasoned that the Attorney General had provided an adequate basis for regulating cigars and smokeless tobacco as well as cigarettes because of the similarities among the products. The court held that the outdoor advertising regulations, which prohibit outdoor advertising within 1,000 feet of a school or playground, do not violate the First Amendment because they advance a substantial government interest and are narrowly tailored to suppress no more speech than necessary. The court concluded that the sales practices regulations, which restrict the location and distribution of tobacco products, survive scrutiny because they do not implicate a significant speech interest. The court invalidated the point-of-sale advertising regulations, which require that indoor advertising be placed no lower than five feet from the floor, finding that the Attorney General had not provided sufficient justification for that restriction. The District Court's ruling with respect to the cigar warning requirements and the Commerce Clause is not before this Court.

The United States Court of Appeals for the First Circuit issued a stay pending appeal, App. 8–9, and affirmed in part and reversed in part the District Court's judgment, *Consolidated Cigar Corp.* v. *Reilly*, 218 F. 3d 30 (2000). With respect to the Supremacy Clause, the Court of Appeals affirmed the District Court's ruling that the Attorney General's cigarette advertising regulations are not pre-empted by the FCLAA. The First Circuit was persuaded by the reasoning of the Second and Seventh Circuits, which had concluded that the FCLAA's pre-emption provision is ambiguous, and held that the provision pre-empts regula-

tions of the content, but not the location, of cigarette advertising. See *Greater New York Metropolitan Food Council, Inc.* v. *Giuliani*, 195 F. 3d 100, 104–110 (CA2 1999); *Federation of Advertising Industry Representatives, Inc.* v. *Chicago*, 189 F. 3d 633, 636–640 (CA7 1999).

With respect to the First Amendment, the Court of Appeals applied the *Central Hudson* test. 447 U. S. 557 (1980). The court held that the outdoor advertising regulations do not violate the First Amendment. The court concluded that the restriction on outdoor advertising within 1,000 feet of a school or playground directly advances the State's substantial interest in preventing tobacco use by minors. The court also found that the outdoor advertising regulations restrict no more speech than necessary, reasoning that the distance chosen by the Attorney General is the sort of determination better suited for legislative and executive decisionmakers than courts. The Court of Appeals reversed the District Court's invalidation of the point-of-sale advertising regulations, again concluding that the Attorney General is better suited to determine what restrictions are necessary. The Court of Appeals also held that the sales practices regulations are valid under the First Amendment. The court found that the regulations directly advance the State's interest in preventing minors' access to tobacco products and that the regulations are narrowly tailored because retailers have a variety of other means to present the packaging of their products and to allow customers to examine the products.

As for the argument that smokeless tobacco and cigars are different from cigarettes, the court expressed some misgivings about equating all tobacco products, but ultimately decided that the Attorney General had presented sufficient evidence with respect to all three products to regulate them similarly. The Court of Appeals' decision with respect to the cigar warning requirements and the Commerce Clause is not before this Court.

The Court of Appeals stayed its mandate pending disposition of a petition for a writ of certiorari. App. 13. The cigarette manufacturers and U. S. Smokeless Tobacco Company filed a petition, challenging the Court of Appeals' decision with respect to the outdoor and point-of-sale advertising regulations on pre-emption and First Amendment grounds, and the sales practices regulations on First Amendment grounds. The cigar companies filed a separate petition, again raising a First Amendment challenge to the outdoor advertising, point-of-sale advertising, and sales practices regulations. We granted both petitions, 531 U. S. 1068 (2001), to resolve the conflict among the Courts of Appeals with respect to whether the FCLAA pre-empts cigarette advertising regulations like those at issue here, cf. *Lindsey* v. *Tacoma-Pierce County Health Dept.*, 195 F. 3d 1065 (CA9 1999), and to decide the important First Amendment issues presented in these cases.

II

Before reaching the First Amendment issues, we must decide to what extent federal law pre-empts the Attorney General's regulations. The cigarette petitioners contend that the FCLAA, 15 U. S. C. § 1331 *et seq.*, pre-empts the Attorney General's cigarette advertising regulations.

A

Article VI, cl. 2, of the United States Constitution commands that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." See also *McCulloch* v. *Maryland*, 4 Wheat. 316, 427 (1819) ("It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments"). This relatively clear and simple mandate has generated considerable discussion in cases where we have had to discern whether Congress has pre-empted state action in a particu-

lar area. State action may be foreclosed by express language in a congressional enactment, see, *e. g., Cipollone* v. *Liggett Group, Inc.*, 505 U. S. 504, 517 (1992), by implication from the depth and breadth of a congressional scheme that occupies the legislative field, see, *e. g., Fidelity Fed. Sav. & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141, 153 (1982), or by implication because of a conflict with a congressional enactment, see, *e. g., Geier* v. *American Honda Motor Co.*, 529 U. S. 861, 869–874 (2000).

In the FCLAA, Congress has crafted a comprehensive federal scheme governing the advertising and promotion of cigarettes. The FCLAA's pre-emption provision provides:

> "(a) Additional statements
>
> "No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
>
> "(b) State regulations
>
> "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." 15 U. S. C. § 1334.

The FCLAA's pre-emption provision does not cover smokeless tobacco or cigars.

In these cases, our task is to identify the domain expressly pre-empted, see *Cipollone, supra,* at 517, because "an express definition of the pre-emptive reach of a statute . . . supports a reasonable inference . . . that Congress did not intend to pre-empt other matters," *Freightliner Corp.* v. *Myrick*, 514 U. S. 280, 288 (1995). Congressional purpose is the "ultimate touchstone" of our inquiry. *Cipollone, supra,* at 516 (internal quotation marks omitted). Because "federal law is said to bar state action in [a] fiel[d] of traditional state regulation," namely, advertising, see *Packer Corp.* v. *Utah*, 285 U. S. 105, 108 (1932), we "wor[k] on the assumption that

the historic police powers of the States [a]re not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress." *California Div. of Labor Standards Enforcement* v. *Dillingham Constr., N. A., Inc.*, 519 U. S. 316, 325 (1997) (internal quotation marks omitted). See also *Medtronic, Inc.* v. *Lohr*, 518 U. S. 470, 475 (1996).

Our analysis begins with the language of the statute. *Hughes Aircraft Co.* v. *Jacobson*, 525 U. S. 432, 438 (1999). In the pre-emption provision, Congress unequivocally precludes the requirement of any additional statements on cigarette packages beyond those provided in § 1333. 15 U. S. C. § 1334(a). Congress further precludes States or localities from imposing any requirement or prohibition based on smoking and health with respect to the advertising and promotion of cigarettes. § 1334(b). Without question, the second clause is more expansive than the first; it employs far more sweeping language to describe the state action that is pre-empted. We must give meaning to each element of the pre-emption provision. We are aided in our interpretation by considering the predecessor pre-emption provision and the circumstances in which the current language was adopted. See *Medtronic, supra*, at 486; *McCarthy* v. *Bronson*, 500 U. S. 136, 139 (1991); *K mart Corp.* v. *Cartier, Inc.*, 486 U. S. 281, 291 (1988).

In 1964, the groundbreaking Report of the Surgeon General's Advisory Committee on Smoking and Health concluded that "[c]igarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action." Department of Health, Education, and Welfare, U. S. Surgeon General's Advisory Committee, Smoking and Health 33. In 1965, Congress enacted the FCLAA as a proactive measure in the face of impending regulation by federal agencies and the States. Pub. L. 89–92, 79 Stat. 282. See also *Cipollone, supra*, at 513–515. The purpose of the FCLAA was twofold: to inform the public adequately about the hazards of cigarette smoking, and to protect the national

economy from interference due to diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to the relationship between smoking and health. Pub. L. 89–92, § 2. The FCLAA prescribed a label for cigarette packages: "Caution: Cigarette Smoking May Be Hazardous to Your Health." § 4. The FCLAA also required the Secretary of Health, Education, and Welfare (HEW) and the Federal Trade Commission (FTC) to report annually to Congress about the health consequences of smoking and the advertising and promotion of cigarettes. § 5.

Section 5 of the FCLAA included a pre-emption provision in which "Congress spoke precisely and narrowly." *Cipollone, supra,* at 518. Subsection (a) prohibited any requirement of additional statements on cigarette packaging. Subsection (b) provided that "[n]o statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." Section 10 of the FCLAA set a termination date of July 1, 1969, for these provisions. As we have previously explained, "on their face, [the pre-emption] provisions merely prohibited state and federal rulemaking bodies from mandating particular cautionary statements on cigarette labels [subsection (a)] or in cigarette advertisements [subsection (b)]." *Cipollone, supra,* at 518.

The FCLAA was enacted with the expectation that Congress would reexamine it in 1969 in light of the developing information about cigarette smoking and health. H. R. Rep. No. 586, 89th Cong., 1st Sess., 6 (1965); 111 Cong. Rec. 16541 (1965). In the intervening years, Congress received reports and recommendations from the HEW Secretary and the FTC. S. Rep. No. 91–566, pp. 2–6 (1969). The HEW Secretary recommended that Congress strengthen the warning, require the warning on all packages and in advertisements, and publish tar and nicotine levels on packages and in advertisements. *Id.,* at 4. The FTC made similar and additional

recommendations. The FTC sought a complete ban on radio and television advertising, a requirement that broadcasters devote time for health hazard announcements concerning smoking, and increased funding for public education and research about smoking. *Id.*, at 6. The FTC urged Congress not to continue to prevent federal agencies from regulating cigarette advertising. *Id.*, at 10. In addition, the Federal Communications Commission (FCC) had concluded that advertising which promoted the use of cigarettes created a duty in broadcast stations to provide information about the hazards of cigarette smoking. *Id.*, at 6–7.

In 1969, House and Senate committees held hearings about the health effects of cigarette smoking and advertising by the cigarette industry. The bill that emerged from the House of Representatives strengthened the warning and maintained the pre-emption provision. The Senate amended that bill, adding the ban on radio and television advertising, and changing the pre-emption language to its present form. H. R. Conf. Rep. No. 91–897, pp. 4–5 (1970).

The final result was the Public Health Cigarette Smoking Act of 1969, in which Congress, following the Senate's amendments, made three significant changes to the FCLAA. Pub. L. 91–222, § 2, 84 Stat. 87. First, Congress drafted a new label that read: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health." FCLAA, § 4. Second, Congress declared it unlawful to advertise cigarettes on any medium of electronic communication subject to the jurisdiction of the FCC. § 6. Finally, Congress enacted the current pre-emption provision, which proscribes any "requirement or prohibition based on smoking and health . . . imposed under State law with respect to the advertising or promotion" of cigarettes. § 5(b). The new subsection (b) did not pre-empt regulation by federal agencies, freeing the FTC to impose warning requirements in cigarette advertising. See *Cipollone*, 505 U. S., at 515. The new pre-emption provision, like its predecessor, only applied to cigarettes, and not other tobacco products.

In 1984, Congress again amended the FCLAA in the Comprehensive Smoking Education Act. Pub. L. 98–474, 98 Stat. 2200. The purpose of the Act was to "provide a new strategy for making Americans more aware of any adverse health effects of smoking, to assure the timely and widespread dissemination of research findings and to enable individuals to make informed decisions about smoking." § 2. The Act established a series of warnings to appear on a rotating basis on cigarette packages and in cigarette advertising, § 4, and directed the Health and Human Services Secretary to create and implement an educational program about the health effects of cigarette smoking, § 3.

The FTC has continued to report on trade practices in the cigarette industry. In 1999, the first year since the master settlement agreement, the FTC reported that the cigarette industry expended $8.24 billion on advertising and promotions, the largest expenditure ever. FTC, Cigarette Report for 1999, p. 1 (2000). Substantial increases were found in point-of-sale promotions, payments made to retailers to facilitate sales, and retail offers such as buy one, get one free, or product giveaways. *Id.*, at 4–5. Substantial decreases, however, were reported for outdoor advertising and transit advertising. *Id.*, at 2. Congress and federal agencies continue to monitor advertising and promotion practices in the cigarette industry.

The scope and meaning of the current pre-emption provision become clearer once we consider the original pre-emption language and the amendments to the FCLAA. Without question, "the plain language of the pre-emption provision in the 1969 Act is much broader." *Cipollone*, 505 U. S., at 520. Rather than preventing only "statements," the amended provision reaches all "requirement[s] or prohibition[s] . . . imposed under State law." And, although the former statute reached only statements "in the advertising," the current provision governs "with respect to the advertising or promotion" of cigarettes. See *ibid.* Congress expanded the pre-emption provision with respect to the

States, and at the same time, it allowed the FTC to regulate cigarette advertising. Congress also prohibited cigarette advertising in electronic media altogether. Viewed in light of the context in which the current pre-emption provision was adopted, we must determine whether the FCLAA pre-empts Massachusetts' regulations governing outdoor and point-of-sale advertising of cigarettes.

B

The Court of Appeals acknowledged that the FCLAA pre-empts any "requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion of . . . cigarettes," 15 U. S. C. § 1334(b), but concluded that the FCLAA does not nullify Massachusetts' cigarette advertising regulations. The court concentrated its analysis on whether the regulations are "with respect to" advertising and promotion, relying on two of its sister Circuits to conclude that the FCLAA only pre-empts regulations of the content of cigarette advertising. The Court of Appeals also reasoned that the Attorney General's regulations are a form of zoning, a traditional area of state power; therefore the presumption against pre-emption applied.

The cigarette petitioners maintain that the Court of Appeals' "with respect to" analysis is inconsistent with the FCLAA's statutory text and legislative history, and gives the States license to prohibit almost all cigarette advertising. Petitioners also maintain that there is no basis for construing the pre-emption provision to prohibit only content-based advertising regulations.

Although they support the Court of Appeals' result, the Attorney General and United States as *amicus curiae* do not fully endorse that court's textual analysis of the pre-emption provision. Instead, they assert that the cigarette advertising regulations are not pre-empted because they are not "based on smoking and health." The Attorney General and

the United States also contend that the regulations are not pre-empted because they do not prescribe the content of cigarette advertising and they fall squarely within the State's traditional powers to control the location of advertising and to protect the welfare of children.

Turning first to the language in the pre-emption provision relied upon by the Court of Appeals, we reject the notion that the Attorney General's cigarette advertising regulations are not "with respect to" advertising and promotion. We disagree with the Court of Appeals' analogy to the Employee Retirement Income Security Act of 1974 (ERISA). In some cases concerning ERISA's pre-emption of state law, the Court has had to decide whether a particular state law "relates to" an employee benefit plan covered by ERISA even though the state law makes no express reference to such a plan. See, *e. g., California Div. of Labor Standards Enforcement* v. *Dillingham Constr., N. A., Inc.*, 519 U. S., at 324–325. Here, however, there is no question about an indirect relationship between the regulations and cigarette advertising because the regulations expressly target cigarette advertising. 940 Code of Mass. Regs. § 21.04(5) (2000).

Before this Court, the Attorney General focuses on a different phrase in the pre-emption provision: "based on smoking and health." The Attorney General argues that the cigarette advertising regulations are not "based on smoking and health," because they do not involve health-related content in cigarette advertising but instead target youth exposure to cigarette advertising. To be sure, Members of this Court have debated the precise meaning of "based on smoking and health," see *Cipollone, supra,* at 529, n. 7 (plurality opinion), but we cannot agree with the Attorney General's narrow construction of the phrase.

As Congress enacted the current pre-emption provision, Congress did not concern itself solely with health warnings for cigarettes. In the 1969 amendments, Congress not only

enhanced its scheme to warn the public about the hazards of cigarette smoking, but also sought to protect the public, including youth, from being inundated with images of cigarette smoking in advertising. In pursuit of the latter goal, Congress banned electronic media advertising of cigarettes. And to the extent that Congress contemplated additional targeted regulation of cigarette advertising, it vested that authority in the FTC.

The context in which Congress crafted the current pre-emption provision leads us to conclude that Congress prohibited state cigarette advertising regulations motivated by concerns about smoking and health. Massachusetts has attempted to address the incidence of underage cigarette smoking by regulating advertising, see 940 Code of Mass. Regs. §21.01 (2000), much like Congress' ban on cigarette advertising in electronic media. At bottom, the concern about youth exposure to cigarette advertising is intertwined with the concern about cigarette smoking and health. Thus the Attorney General's attempt to distinguish one concern from the other must be rejected.

The Attorney General next claims that the State's outdoor and point-of-sale advertising regulations for cigarettes are not pre-empted because they govern the location, and not the content, of advertising. This is also JUSTICE STEVENS' main point with respect to pre-emption. *Post*, at 595 (opinion concurring in part, concurring in judgment in part, and dissenting in part).

The content versus location distinction has some surface appeal. The pre-emption provision immediately follows the section of the FCLAA that prescribes warnings. See 15 U. S. C. §§1333, 1334. The pre-emption provision itself refers to cigarettes "labeled in conformity with" the statute. §1334(b). But the content/location distinction cannot be squared with the language of the pre-emption provision, which reaches *all* "requirements" and "prohibitions" "imposed under State law." A distinction between the content

of advertising and the location of advertising in the FCLAA also cannot be reconciled with Congress' own location-based restriction, which bans advertising in electronic media, but not elsewhere. See § 1335. We are not at liberty to pick and choose which provisions in the legislative scheme we will consider, see *post*, at 596, n. 5 (opinion of STEVENS, J.), but must examine the FCLAA as a whole.

Moreover, any distinction between the content and location of cigarette advertising collapses once the implications of that approach are fully considered. At oral argument, the Attorney General was pressed to explain what types of state regulations of cigarette advertising, in his view, are pre-empted by the FCLAA. The Attorney General maintained that a state law that required cigarette retailers to remove the word "tobacco" from advertisements, or required cigarette billboards to be blank, would be pre-empted if it were a regulation of "health-related content." Tr. of Oral Arg. 41, 42. The Attorney General also maintained, however, that a complete ban on all cigarette advertising would not be pre-empted because Congress did not intend to invade local control over zoning. *Id.*, at 42–44. The latter position clearly follows from the factual distinction between content and location, but it finds no support in the text of the FCLAA's pre-emption provision. We believe that Congress wished to ensure that "a State could not do through negative mandate (*e. g.*, banning all cigarette advertising) that which it already was forbidden to do through positive mandate (*e. g.*, mandating particular cautionary statements)." *Cipollone*, 505 U. S., at 539 (Blackmun, J., joined by KENNEDY and SOUTER, JJ., concurring in part and dissenting in part). See also *Vango Media, Inc.* v. *New York*, 34 F. 3d 68 (CA2 1994) (holding pre-empted a regulation that required one public health message for every four cigarette advertisements).

JUSTICE STEVENS, *post*, at 595–598, maintains that Congress did not intend to displace state regulation of the location of cigarette advertising. There is a critical distinction,

however, between generally applicable zoning regulations, see *infra*, at 551–552, and regulations targeting cigarette advertising. The latter type of regulation, which is inevitably motivated by concerns about smoking and health, squarely contradicts the FCLAA. The FCLAA's comprehensive warnings, advertising restrictions, and pre-emption provision would make little sense if a State or locality could simply target and ban all cigarette advertising.

JUSTICE STEVENS finds it ironic that we conclude that "federal law precludes States and localities from protecting children from dangerous products within 1,000 feet of a school," in light of our prior conclusion that the "Federal Government lacks the constitutional authority to impose a similarly motivated ban" in *United States* v. *Lopez*, 514 U. S. 549 (1995). *Post*, at 598–599, n. 8. Our holding is not as broad as JUSTICE STEVENS states; we hold only that the FCLAA pre-empts state regulations targeting cigarette advertising. States remain free to enact generally applicable zoning regulations, and to regulate conduct with respect to cigarette use and sales. *Infra*, at 552. The reference to *Lopez* is also inapposite. In *Lopez*, we held that Congress exceeded the limits of its Commerce Clause power in the Gun-Free School Zones Act of 1990, which made it a federal crime to possess a firearm in a school zone. 514 U. S., at 553–568. These cases, by contrast, concern the Supremacy Clause and the doctrine of pre-emption as applied in a case where Congress expressly precluded certain state regulations of cigarette advertising. Massachusetts did not raise a constitutional challenge to the FCLAA, and we are not confronted with whether Congress exceeded its constitutionally delegated authority in enacting the FCLAA.

In sum, we fail to see how the FCLAA and its pre-emption provision permit a distinction between the specific concern about minors and cigarette advertising and the more general concern about smoking and health in cigarette advertising, especially in light of the fact that Congress crafted a legisla-

tive solution for those very concerns. We also conclude that a distinction between state regulation of the location as opposed to the content of cigarette advertising has no foundation in the text of the pre-emption provision. Congress pre-empted state cigarette advertising regulations like the Attorney General's because they would upset federal legislative choices to require specific warnings and to impose the ban on cigarette advertising in electronic media in order to address concerns about smoking and health. Accordingly, we hold that the Attorney General's outdoor and point-of-sale advertising regulations targeting cigarettes are pre-empted by the FCLAA.

C

Although the FCLAA prevents States and localities from imposing special requirements or prohibitions "based on smoking and health" "with respect to the advertising or promotion" of cigarettes, that language still leaves significant power in the hands of States to impose generally applicable zoning regulations and to regulate conduct. As we noted in *Cipollone*, "each phrase within [the provision] limits the universe of [state action] pre-empted by the statute." 505 U. S., at 524 (plurality opinion).

For instance, the FCLAA does not restrict a State or locality's ability to enact generally applicable zoning restrictions. We have recognized that state interests in traffic safety and esthetics may justify zoning regulations for advertising. See *Metromedia, Inc.* v. *San Diego*, 453 U. S. 490, 507–508 (1981). See also *St. Louis Poster Advertising Co.* v. *St. Louis*, 249 U. S. 269, 274 (1919); *Thomas Cusack Co.* v. *Chicago*, 242 U. S. 526, 529–531 (1917). Although Congress has taken into account the unique concerns about cigarette smoking and health in advertising, there is no indication that Congress intended to displace local community interests in general regulations of the location of billboards or large marquee advertising, or that Congress intended cigarette advertisers to be afforded special treatment in that regard. Re-

strictions on the location and size of advertisements that apply to cigarettes on equal terms with other products appear to be outside the ambit of the pre-emption provision. Such restrictions are not "based on smoking and health."

The FCLAA also does not foreclose all state regulation of conduct as it relates to the sale or use of cigarettes. The FCLAA's pre-emption provision explicitly governs state regulations of "advertising or promotion."* Accordingly, the FCLAA does not pre-empt state laws prohibiting cigarette sales to minors. To the contrary, there is an established congressional policy that supports such laws; Congress has required States to prohibit tobacco sales to minors as a condition of receiving federal block grant funding for substance abuse treatment activities. 106 Stat. 394, 388, 42 U. S. C. §§ 300x–26(a)(1), 300x–21.

In Massachusetts, it is illegal to sell or distribute tobacco products to persons under the age of 18. Mass. Gen. Laws, ch. 270, § 6 (2000). Having prohibited the sale and distribution of tobacco products to minors, the State may prohibit common inchoate offenses that attach to criminal conduct, such as solicitation, conspiracy, and attempt. Cf. *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of New York*, 447 U. S., at 563–564; *Carey* v. *Population Servs. Int'l*, 431 U. S. 678, 701 (1977); *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 772 (1976); 60 Fed. Reg. 41330–41332 (1995) (citing evidence that industry may be attempting to induce individuals under 18 to smoke cigarettes). States and localities also have at their disposal other means of regulating conduct to ensure that minors do not obtain cigarettes. See Part III–D, *infra*.

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*The Senate Report explained that the pre-emption provision "would in no way affect the power of any State or political subdivision of any State with respect to the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings, or similar police regulations. It is limited entirely to State or local requirements or prohibitions in the advertising of cigarettes." S. Rep. No. 91–566, p. 12 (1969).

D

The smokeless tobacco petitioners argue that if the State's outdoor and point-of-sale advertising regulations for cigarettes are pre-empted, then the same advertising regulations with respect to smokeless tobacco must be invalidated because they cannot be severed from the cigarette provisions. Brief for Petitioner U. S. Smokeless Tobacco Co. in Nos. 00–596 and 00–597, p. 4, n. 5. The District Court did not reach the severability issue with respect to the advertising provisions that are before this Court. 76 F. Supp. 2d, at 134, n. 11. The Court of Appeals also did not reach severability because that court likewise concluded that the cigarette advertising regulations were not pre-empted. 218 F. 3d, at 37, n. 3. We decline to reach an issue that was not decided below. *National Collegiate Athletic Assn.* v. *Smith*, 525 U. S. 459, 470 (1999).

III

By its terms, the FCLAA's pre-emption provision only applies to cigarettes. Accordingly, we must evaluate the smokeless tobacco and cigar petitioners' First Amendment challenges to the State's outdoor and point-of-sale advertising regulations. The cigarette petitioners did not raise a pre-emption challenge to the sales practices regulations. Thus, we must analyze the cigarette as well as the smokeless tobacco and cigar petitioners' claim that certain sales practices regulations for tobacco products violate the First Amendment.

A

For over 25 years, the Court has recognized that commercial speech does not fall outside the purview of the First Amendment. See, *e. g.*, *Virginia Bd. of Pharmacy*, *supra*, at 762. Instead, the Court has afforded commercial speech a measure of First Amendment protection "'commensurate'" with its position in relation to other constitutionally guaranteed expression. See, *e. g.*, *Florida Bar* v. *Went For It, Inc.*,

515 U. S. 618, 623 (1995) (quoting *Board of Trustees of State Univ. of N. Y.* v. *Fox*, 492 U. S. 469, 477 (1989)). In recognition of the "distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech," *Central Hudson, supra*, at 562 (internal quotation marks omitted), we developed a framework for analyzing regulations of commercial speech that is "substantially similar" to the test for time, place, and manner restrictions, *Board of Trustees of State Univ. of N. Y.* v. *Fox, supra*, at 477. The analysis contains four elements:

> "At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Central Hudson, supra*, at 566.

Petitioners urge us to reject the *Central Hudson* analysis and apply strict scrutiny. They are not the first litigants to do so. See, *e. g., Greater New Orleans Broadcasting Assn., Inc.* v. *United States*, 527 U. S. 173, 184 (1999). Admittedly, several Members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases. See, *e. g., Greater New Orleans, supra*, at 197 (THOMAS, J., concurring in judgment); *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S. 484, 501, 510–514 (1996) (joint opinion of STEVENS, KENNEDY, and GINSBURG, JJ.); *id.*, at 517 (SCALIA, J., concurring in part and concurring in judgment); *id.*, at 518 (THOMAS, J., concurring in part and concurring in judgment). But here, as in *Greater New Orleans*, we see "no need to break new ground. *Central Hudson*, as

applied in our more recent commercial speech cases, provides an adequate basis for decision." 527 U. S., at 184.

Only the last two steps of *Central Hudson*'s four-part analysis are at issue here. The Attorney General has assumed for purposes of summary judgment that petitioners' speech is entitled to First Amendment protection. 218 F. 3d, at 43; 84 F. Supp. 2d, at 185–186. With respect to the second step, none of the petitioners contests the importance of the State's interest in preventing the use of tobacco products by minors. Brief for Petitioners Lorillard Tobacco Co. et al. in No. 00–596, p. 41; Brief for Petitioner U. S. Smokeless Tobacco Co. in Nos. 00–596 and 00–597, at 16; Brief for Petitioners Altadis U. S. A. Inc. et al. in No. 00–597, p. 8.

The third step of *Central Hudson* concerns the relationship between the harm that underlies the State's interest and the means identified by the State to advance that interest. It requires that

> "the speech restriction directly and materially advanc[e] the asserted governmental interest. 'This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'" *Greater New Orleans, supra,* at 188 (quoting *Edenfield* v. *Fane,* 507 U. S. 761, 770–771 (1993)).

We do not, however, require that "empirical data come . . . accompanied by a surfeit of background information. . . . [W]e have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and 'simple common sense.'" *Florida Bar* v. *Went For It, Inc., supra,* at 628 (citations and internal quotation marks omitted).

The last step of the *Central Hudson* analysis "complements" the third step, "asking whether the speech restriction is not more extensive than necessary to serve the interests that support it." *Greater New Orleans, supra,* at 188. We have made it clear that "the least restrictive means" is not the standard; instead, the case law requires a reasonable "'fit between the legislature's ends and the means chosen to accomplish those ends, . . . a means narrowly tailored to achieve the desired objective.'" *Went For It, Inc., supra,* at 632 (quoting *Board of Trustees of State Univ. of N. Y.* v. *Fox, supra,* at 480). Focusing on the third and fourth steps of the *Central Hudson* analysis, we first address the outdoor advertising and point-of-sale advertising regulations for smokeless tobacco and cigars. We then address the sales practices regulations for all tobacco products.

B

The outdoor advertising regulations prohibit smokeless tobacco or cigar advertising within a 1,000-foot radius of a school or playground. 940 Code of Mass. Regs. §§ 21.04(5)(a), 22.06(5)(a) (2000). The District Court and Court of Appeals concluded that the Attorney General had identified a real problem with underage use of tobacco products, that limiting youth exposure to advertising would combat that problem, and that the regulations burdened no more speech than necessary to accomplish the State's goal. 218 F. 3d, at 44–53; 84 F. Supp. 2d, at 186–193. The smokeless tobacco and cigar petitioners take issue with all of these conclusions.

1

The smokeless tobacco and cigar petitioners contend that the Attorney General's regulations do not satisfy *Central Hudson*'s third step. They maintain that although the Attorney General may have identified a problem with underage cigarette smoking, he has not identified an equally severe problem with respect to underage use of smokeless tobacco

or cigars. The smokeless tobacco petitioner emphasizes the "lack of parity" between cigarettes and smokeless tobacco. Brief for Petitioner U. S. Smokeless Tobacco Co. in Nos. 00–596 and 00–597, at 19; Reply Brief for Petitioner U. S. Smokeless Tobacco Co. in Nos. 00–596 and 00–597, pp. 4, 10–11. The cigar petitioners catalog a list of differences between cigars and other tobacco products, including the characteristics of the products and marketing strategies. Brief for Petitioners Altadis U. S. A. Inc. et al. in No. 00–597, at 9–11. The petitioners finally contend that the Attorney General cannot prove that advertising has a causal link to tobacco use such that limiting advertising will materially alleviate any problem of underage use of their products. Brief for Petitioner U. S. Smokeless Tobacco Co. in Nos. 00–596 and 00–597, at 20–22; Brief for Petitioners Altadis U. S. A. Inc. et al. in No. 00–597, at 9–16.

In previous cases, we have acknowledged the theory that product advertising stimulates demand for products, while suppressed advertising may have the opposite effect. See *Rubin*, 514 U. S., at 487; *United States* v. *Edge Broadcasting Co.*, 509 U. S. 418, 434 (1993); *Central Hudson*, 447 U. S., at 568–569. The Attorney General cites numerous studies to support this theory in the case of tobacco products.

The Attorney General relies in part on evidence gathered by the Food and Drug Administration (FDA) in its attempt to regulate the advertising of cigarettes and smokeless tobacco. See Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents, FDA Proposed Rule, 60 Fed. Reg. 41314 (1995); Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, FDA Final Rule, 61 Fed. Reg. 44396 (1996). The FDA promulgated the advertising regulations after finding that the period prior to adulthood is when an overwhelming majority of Americans first decide to use tobacco products, and that advertising plays a crucial

role in that decision. *Id.*, at 44398–44399. We later held that the FDA lacks statutory authority to regulate tobacco products. See *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120 (2000). Nevertheless, the Attorney General relies on the FDA's proceedings and other studies to support his decision that advertising affects demand for tobacco products. Cf. *Erie* v. *Pap's A. M.*, 529 U. S. 277, 296 (2000) (plurality opinion) (cities and localities may rely on evidence from other jurisdictions to demonstrate harmful secondary effects of adult entertainment and to justify regulation); *Barnes* v. *Glen Theatre, Inc.*, 501 U. S. 560, 583–584 (1991) (SOUTER, J., concurring in judgment) (same); *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 50–52 (1986) (same). See also *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 393, and n. 6 (2000) (discussing evidence of corruption and the appearance of corruption in campaign finance).

In its rulemaking proceeding, the FDA considered several studies of tobacco advertising and trends in the use of various tobacco products. The Surgeon General's report and the Institute of Medicine's report found that "there is sufficient evidence to conclude that advertising and labeling play a significant and important contributory role in a young person's decision to use cigarettes or smokeless tobacco products." 60 Fed. Reg. 41332. See also Pierce et al., Tobacco Industry Promotion of Cigarettes and Adolescent Smoking, 279 JAMA 511, 514 (1998).

For instance, children smoke fewer brands of cigarettes than adults, and those choices directly track the most heavily advertised brands, unlike adult choices, which are more dispersed and related to pricing. FDA Proposed Rule, 60 Fed. Reg. 41332. Another study revealed that 72% of 6 year olds and 52% of children ages 3 to 6 recognized "Joe Camel," the cartoon anthropomorphic symbol of R. J. Reynolds' Camel brand cigarettes. *Id.*, at 41333. After the introduction of Joe Camel, Camel cigarettes' share of the youth market rose from 4% to 13%. *Id.*, at 41330. The FDA also identified

trends in tobacco consumption among certain populations, such as young women, that correlated to the introduction and marketing of products geared toward that population. *Id.*, at 41333.

The FDA also made specific findings with respect to smokeless tobacco. The FDA concluded that "[t]he recent and very large increase in the use of smokeless tobacco products by young people and the addictive nature of these products has persuaded the agency that these products must be included in any regulatory approach that is designed to help prevent future generations of young people from becoming addicted to nicotine-containing tobacco products." *Id.*, at 41318. Studies have analyzed smokeless tobacco use by young people, discussing trends based on gender, school grade, and locale. See, *e. g.*, Boyd et al., Use of Smokeless Tobacco among Children and Adolescents in the United States, 16 Preventative Medicine 402–418 (1987), Record, Doc. No. 38, Exh. 63.

Researchers tracked a dramatic shift in patterns of smokeless tobacco use from older to younger users over the past 30 years. See, *e. g.*, FDA Proposed Rule, 60 Fed. Reg. 41317; Tomar, Giovano, & Erickson, Smokeless tobacco brand preference and brand switching among US adolescents and young adults, 4 Tobacco Control 67 (1995), Record, Doc. No. 38, Exh. 62; Department of Health and Human Services, Preventing Tobacco Use Among Young People: A Report of the Surgeon General 163 (1994), Record, Doc. No. 36, Exh. 1. In particular, the smokeless tobacco industry boosted sales tenfold in the 1970's and 1980's by targeting young males. FDA Proposed Rule, 60 Fed. Reg. 41331. See also National Cancer Institute, Cigars: Health Effects and Trends, Smoking and Tobacco Control Monograph No. 9, p. 16 (1998), Record, Doc. No. 39, Exh. 67. Another study documented the targeting of youth through smokeless tobacco sales and advertising techniques. Ernster, Advertising and Promotion of Smokeless Tobacco Products, National Cancer Institute

Monograph No. 8, pp. 87–93 (1989), Record, Doc. No. 38, Exh. 66.

The Attorney General presents different evidence with respect to cigars. There was no data on underage cigar use prior to 1996 because the behavior was considered "uncommon enough not to be worthy of examination." Smoking and Tobacco Control Monograph No. 9, at 13; FTC Report to Congress: Cigar Sales and Advertising and Promotional Expenses for Calendar Years 1996 and 1997, p. 9 (1999), Record, Doc. No. 39, Exh. 71. In 1995, the FDA decided not to include cigars in its attempted regulation of tobacco product advertising, explaining that "the agency does not currently have sufficient evidence that these products are drug delivery devices . . . . FDA has focused its investigation of its authority over tobacco products on cigarettes and smokeless tobacco products, and not on pipe tobacco or cigars, because young people predominantly use cigarettes and smokeless tobacco products." 60 Fed. Reg. 41322.

More recently, however, data on youth cigar use has emerged. The National Cancer Institute concluded in its 1998 Monograph that the rate of cigar use by minors is increasing and that, in some States, the cigar use rates are higher than the smokeless tobacco use rates for minors. Smoking and Tobacco Control Monograph No. 9, at 19, 42–51. In its 1999 Report to Congress, the FTC concluded that "substantial numbers of adolescents are trying cigars." FTC Report to Congress, at 9. See also Department of Health and Human Services, Office of Inspector General, Youth Use of Cigars: Patterns of Use and Perceptions of Risk (1999), Record, Doc. No. 39, Exh. 78.

Studies have also demonstrated a link between advertising and demand for cigars. After Congress recognized the power of images in advertising and banned cigarette advertising in electronic media, television advertising of small cigars "increased dramatically in 1972 and 1973," "filled the void left by cigarette advertisers," and "sales . . . soared."

Smoking and Tobacco Control Monograph No. 9, at 24. In 1973, Congress extended the electronic media advertising ban for cigarettes to little cigars. Little Cigar Act, Pub. L. 93–109, § 3, 87 Stat. 352, as amended, 15 U. S. C. § 1335. In the 1990's, cigar advertising campaigns triggered a boost in sales. Smoking and Tobacco Control Monograph No. 9, at 215.

Our review of the record reveals that the Attorney General has provided ample documentation of the problem with underage use of smokeless tobacco and cigars. In addition, we disagree with petitioners' claim that there is no evidence that preventing targeted campaigns and limiting youth exposure to advertising will decrease underage use of smokeless tobacco and cigars. On this record and in the posture of summary judgment, we are unable to conclude that the Attorney General's decision to regulate advertising of smokeless tobacco and cigars in an effort to combat the use of tobacco products by minors was based on mere "speculation [and] conjecture." *Edenfield* v. *Fane*, 507 U. S., at 770.

2

Whatever the strength of the Attorney General's evidence to justify the outdoor advertising regulations, however, we conclude that the regulations do not satisfy the fourth step of the *Central Hudson* analysis. The final step of the *Central Hudson* analysis, the "critical inquiry in this case," requires a reasonable fit between the means and ends of the regulatory scheme. 447 U. S., at 569. The Attorney General's regulations do not meet this standard. The broad sweep of the regulations indicates that the Attorney General did not "carefully calculat[e] the costs and benefits associated with the burden on speech imposed" by the regulations. *Cincinnati* v. *Discovery Network, Inc.*, 507 U. S. 410, 417 (1993) (internal quotation marks omitted).

The outdoor advertising regulations prohibit any smokeless tobacco or cigar advertising within 1,000 feet of schools

or playgrounds. In the District Court, petitioners maintained that this prohibition would prevent advertising in 87% to 91% of Boston, Worcester, and Springfield, Massachusetts. 84 F. Supp. 2d, at 191. The 87% to 91% figure appears to include not only the effect of the regulations, but also the limitations imposed by other generally applicable zoning restrictions. See App. 161–167. The Attorney General disputed petitioners' figures but "concede[d] that the reach of the regulations is substantial." 218 F. 3d, at 50. Thus, the Court of Appeals concluded that the regulations prohibit advertising in a substantial portion of the major metropolitan areas of Massachusetts. *Ibid.*

The substantial geographical reach of the Attorney General's outdoor advertising regulations is compounded by other factors. "Outdoor" advertising includes not only advertising located outside an establishment, but also advertising inside a store if that advertising is visible from outside the store. The regulations restrict advertisements of any size and the term advertisement also includes oral statements. 940 Code of Mass. Regs. §§ 21.03, 22.03 (2000).

In some geographical areas, these regulations would constitute nearly a complete ban on the communication of truthful information about smokeless tobacco and cigars to adult consumers. The breadth and scope of the regulations, and the process by which the Attorney General adopted the regulations, do not demonstrate a careful calculation of the speech interests involved.

First, the Attorney General did not seem to consider the impact of the 1,000-foot restriction on commercial speech in major metropolitan areas. The Attorney General apparently selected the 1,000-foot distance based on the FDA's decision to impose an identical 1,000-foot restriction when it attempted to regulate cigarette and smokeless tobacco advertising. See FDA Final Rule, 61 Fed. Reg. 44399; Brief for Respondents 45, and n. 23. But the FDA's 1,000-foot regulation was not an adequate basis for the Attorney Gen-

eral to tailor the Massachusetts regulations. The degree to which speech is suppressed—or alternative avenues for speech remain available—under a particular regulatory scheme tends to be case specific. See, *e. g.*, *Renton*, 475 U. S., at 53–54. And a case specific analysis makes sense, for although a State or locality may have common interests and concerns about underage smoking and the effects of tobacco advertisements, the impact of a restriction on speech will undoubtedly vary from place to place. The FDA's regulations would have had widely disparate effects nationwide. Even in Massachusetts, the effect of the Attorney General's speech regulations will vary based on whether a locale is rural, suburban, or urban. The uniformly broad sweep of the geographical limitation demonstrates a lack of tailoring.

In addition, the range of communications restricted seems unduly broad. For instance, it is not clear from the regulatory scheme why a ban on oral communications is necessary to further the State's interest. Apparently that restriction means that a retailer is unable to answer inquiries about its tobacco products if that communication occurs outdoors. Similarly, a ban on all signs of any size seems ill suited to target the problem of highly visible billboards, as opposed to smaller signs. To the extent that studies have identified particular advertising and promotion practices that appeal to youth, tailoring would involve targeting those practices while permitting others. As crafted, the regulations make no distinction among practices on this basis.

The Court of Appeals recognized that the smokeless tobacco and cigar petitioners' concern about the amount of speech restricted was "valid," but reasoned that there was an "obvious connection to the state's interest in protecting minors." 218 F. 3d, at 50. Even on the premise that Massachusetts has demonstrated a connection between the outdoor advertising regulations and its substantial interest in preventing underage tobacco use, the question of tailoring re-

mains. The Court of Appeals failed to follow through with an analysis of the countervailing First Amendment interests.

The State's interest in preventing underage tobacco use is substantial, and even compelling, but it is no less true that the sale and use of tobacco products by adults is a legal activity. We must consider that tobacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products. In a case involving indecent speech on the Internet we explained that "the governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults." *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 875 (1997) (citations omitted). See, *e. g.*, *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 74 (1983) ("The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox"); *Butler* v. *Michigan*, 352 U. S. 380, 383 (1957) ("The incidence of this enactment is to reduce the adult population . . . to reading only what is fit for children"). As the State protects children from tobacco advertisements, tobacco manufacturers and retailers and their adult consumers still have a protected interest in communication. Cf. *American Civil Liberties Union*, *supra*, at 886–889 (O'CONNOR, J., concurring in judgment in part and dissenting in part) (discussing the creation of "adult zones" on the Internet).

In some instances, Massachusetts' outdoor advertising regulations would impose particularly onerous burdens on speech. For example, we disagree with the Court of Appeals' conclusion that because cigar manufacturers and retailers conduct a limited amount of advertising in comparison to other tobacco products, "the relative lack of cigar advertising also means that the burden imposed on cigar advertisers is correspondingly small." 218 F. 3d, at 49. If some retailers have relatively small advertising budgets, and use

few avenues of communication, then the Attorney General's outdoor advertising regulations potentially place a greater, not lesser, burden on those retailers' speech. Furthermore, to the extent that cigar products and cigar advertising differ from that of other tobacco products, that difference should inform the inquiry into what speech restrictions are necessary.

In addition, a retailer in Massachusetts may have no means of communicating to passersby on the street that it sells tobacco products because alternative forms of advertisement, like newspapers, do not allow that retailer to propose an instant transaction in the way that onsite advertising does. The ban on any indoor advertising that is visible from the outside also presents problems in establishments like convenience stores, which have unique security concerns that counsel in favor of full visibility of the store from the outside. It is these sorts of considerations that the Attorney General failed to incorporate into the regulatory scheme.

We conclude that the Attorney General has failed to show that the outdoor advertising regulations for smokeless tobacco and cigars are not more extensive than necessary to advance the State's substantial interest in preventing underage tobacco use. JUSTICE STEVENS urges that the Court remand the case for further development of the factual record. *Post*, at 601–603. We believe that a remand is inappropriate in these cases because the State had ample opportunity to develop a record with respect to tailoring (as it had to justify its decision to regulate advertising), and additional evidence would not alter the nature of the scheme before the Court. See *Greater New Orleans*, 527 U. S., at 189, n. 6.

A careful calculation of the costs of a speech regulation does not mean that a State must demonstrate that there is no incursion on legitimate speech interests, but a speech regulation cannot unduly impinge on the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products. After

reviewing the outdoor advertising regulations, we find the calculation in these cases insufficient for purposes of the First Amendment.

C

Massachusetts has also restricted indoor, point-of-sale advertising for smokeless tobacco and cigars. Advertising cannot be "placed lower than five feet from the floor of any retail establishment which is located within a one thousand foot radius of" any school or playground. 940 Code of Mass. Regs. §§21.04(5)(b), 22.06(5)(b) (2000). The District Court invalidated these provisions, concluding that the Attorney General had not provided a sufficient basis for regulating indoor advertising. 84 F. Supp. 2d, at 192–193, 195. The Court of Appeals reversed. 218 F. 3d, at 50–51. The court explained: "We do have some misgivings about the effectiveness of a restriction that is based on the assumption that minors under five feet tall will not, or will less frequently, raise their view above eye-level, but we find that such [a] determination falls within that range of reasonableness in which the Attorney General is best suited to pass judgment." *Id.*, at 51.

We conclude that the point-of-sale advertising regulations fail both the third and fourth steps of the *Central Hudson* analysis. A regulation cannot be sustained if it "'provides only ineffective or remote support for the government's purpose,'" *Edenfield*, 507 U. S., at 770 (quoting *Central Hudson*, 447 U. S., at 564), or if there is "little chance" that the restriction will advance the State's goal, *Greater New Orleans*, *supra*, at 193 (internal quotation marks omitted). As outlined above, the State's goal is to prevent minors from using tobacco products and to curb demand for that activity by limiting youth exposure to advertising. The 5-foot rule does not seem to advance that goal. Not all children are less than 5 feet tall, and those who are certainly have the ability to look up and take in their surroundings.

By contrast to JUSTICE STEVENS, *post*, at 604–605, we do not believe this regulation can be construed as a mere regulation of conduct under *United States* v. *O'Brien*, 391 U. S. 367 (1968). To qualify as a regulation of communicative action governed by the scrutiny outlined in *O'Brien*, the State's regulation must be unrelated to expression. *Texas* v. *Johnson*, 491 U. S. 397, 403 (1989). See also *Erie* v. *Pap's A. M.*, 529 U. S., at 289–296 (plurality opinion). Here, Massachusetts' height restriction is an attempt to regulate directly the communicative impact of indoor advertising.

Massachusetts may wish to target tobacco advertisements and displays that entice children, much like floor-level candy displays in a convenience store, but the blanket height restriction does not constitute a reasonable fit with that goal. The Court of Appeals recognized that the efficacy of the regulation was questionable, but decided that, "[i]n any event, the burden on speech imposed by the provision is very limited." 218 F. 3d, at 51. There is no *de minimis* exception for a speech restriction that lacks sufficient tailoring or justification. We conclude that the restriction on the height of indoor advertising is invalid under *Central Hudson*'s third and fourth prongs.

D

The Attorney General also promulgated a number of regulations that restrict sales practices by cigarette, smokeless tobacco, and cigar manufacturers and retailers. Among other restrictions, the regulations bar the use of self-service displays and require that tobacco products be placed out of the reach of all consumers in a location accessible only to salespersons. 940 Code of Mass. Regs. §§ 21.04(2)(c)–(d), 22.06(2)(c)–(d) (2000). The cigarette petitioners do not challenge the sales practices regulations on pre-emption grounds. Brief for Petitioners Lorillard Tobacco Co. et al. in No. 00–596, at 5, n. 2. Two of the cigarette petitioners (Brown & Williamson Tobacco Corporation and Lorillard Tobacco Company), petitioner U. S. Smokeless Tobacco Com-

pany, and the cigar petitioners challenge the sales practices regulations on First Amendment grounds. The cigar petitioners additionally challenge a provision that prohibits sampling or promotional giveaways of cigars or little cigars. 940 Code of Mass. Regs. § 22.06(1)(a) (2000).

The District Court concluded that these restrictions implicate no cognizable speech interest, 84 F. Supp. 2d, at 195–196, but the Court of Appeals did not fully adopt that reasoning. The Court of Appeals recognized that self-service displays "often do have some communicative commercial function," but noted that the restriction in the regulations "is not on speech, but rather on the physical location of actual tobacco products." 218 F. 3d, at 53. The court reasoned that nothing in the regulations would prevent the display of empty tobacco product containers, so long as no actual tobacco product was displayed, much like movie jackets at a video store. *Ibid.* With respect to cigar products, the court observed that retailers traditionally allow access to those products, so that the consumer may make a selection on the basis of a number of objective and subjective factors including the aroma and feel of the cigars. *Ibid.* Even assuming a speech interest, however, the court concluded that the regulations were narrowly tailored to serve the State's substantial interest in preventing access to tobacco products by minors. *Id.*, at 54. The court also noted that the restrictions do not apply to adult-only establishments. *Ibid.*

Petitioners devoted little of their briefing to the sales practices regulations, and our understanding of the regulations is accordingly limited by the parties' submissions. As we read the regulations, they basically require tobacco retailers to place tobacco products behind counters and require customers to have contact with a salesperson before they are able to handle a tobacco product.

The cigarette and smokeless tobacco petitioners contend that "the same First Amendment principles that require invalidation of the outdoor and indoor advertising restrictions

require invalidation of the display regulations at issue in this case." Brief for Petitioners Lorillard Tobacco Co. et al. in No. 00–596, at 46, n. 7. See also Reply Brief for Petitioner U. S. Smokeless Tobacco Co. in Nos. 00–596 and 00–597, at 12, n. 7. The cigar petitioners contend that self-service displays for cigars cannot be prohibited because each brand of cigar is unique and customers traditionally have sought to handle and compare cigars at the time of purchase. Brief for Petitioners Altadis U. S. A. Inc. et al. in No. 00–597, at 23, n. 9; Reply Brief for Petitioners Altadis U. S. A. Inc. et al. in No. 00–597, p. 10, n. 7.

We reject these contentions. Assuming that petitioners have a cognizable speech interest in a particular means of displaying their products, cf. *Cincinnati* v. *Discovery Network, Inc.*, 507 U. S. 410 (1993) (distribution of a magazine through newsracks), these regulations withstand First Amendment scrutiny.

Massachusetts' sales practices provisions regulate conduct that may have a communicative component, but Massachusetts seeks to regulate the placement of tobacco products for reasons unrelated to the communication of ideas. See *O'Brien, supra,* at 382. See also *Pap's A. M.*, 529 U. S., at 289 (plurality opinion); *id.*, at 310 (SOUTER, J., concurring in part and dissenting in part); *Johnson, supra,* at 403. We conclude that the State has demonstrated a substantial interest in preventing access to tobacco products by minors and has adopted an appropriately narrow means of advancing that interest. See *O'Brien, supra,* at 382.

Unattended displays of tobacco products present an opportunity for access without the proper age verification required by law. Thus, the State prohibits self-service and other displays that would allow an individual to obtain tobacco products without direct contact with a salesperson. It is clear that the regulations leave open ample channels of communication. The regulations do not significantly impede adult access to tobacco products. Moreover, retailers have other

means of exercising any cognizable speech interest in the presentation of their products. We presume that vendors may place empty tobacco packaging on open display, and display actual tobacco products so long as that display is only accessible to sales personnel. As for cigars, there is no indication in the regulations that a customer is unable to examine a cigar prior to purchase, so long as that examination takes place through a salesperson.

The cigar petitioners also list Massachusetts' prohibition on sampling and free giveaways among the regulations they challenge on First Amendment grounds. See 940 Code of Mass. Regs. § 22.06(1)(a) (2000); Brief for Petitioners Altadis U. S. A. Inc. et al. in No. 00–597, at 2. At no point in their briefs or at oral argument, however, did the cigar petitioners argue the merits of their First Amendment claim with respect to the sampling and giveaway regulation. We decline to address an issue that was not sufficiently briefed and argued before this Court. See *Northwest Airlines, Inc.* v. *County of Kent*, 510 U. S. 355, 366, n. 10 (1994); *Williams* v. *United States*, 503 U. S. 193, 206 (1992); *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33, 38–40 (1989).

We conclude that the sales practices regulations withstand First Amendment scrutiny. The means chosen by the State are narrowly tailored to prevent access to tobacco products by minors, are unrelated to expression, and leave open alternative avenues for vendors to convey information about products and for would-be customers to inspect products before purchase.

IV

We have observed that "tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S., at 161. From a policy perspective, it is understandable for the States to attempt to prevent minors from using tobacco products before they reach an age where they are capable of weighing

for themselves the risks and potential benefits of tobacco use, and other adult activities. Federal law, however, places limits on policy choices available to the States.

In these cases, Congress enacted a comprehensive scheme to address cigarette smoking and health in advertising and pre-empted state regulation of cigarette advertising that attempts to address that same concern, even with respect to youth. The First Amendment also constrains state efforts to limit advertising of tobacco products, because so long as the sale and use of tobacco is lawful for adults, the tobacco industry has a protected interest in communicating information about its products and adult customers have an interest in receiving that information.

To the extent that federal law and the First Amendment do not prohibit state action, States and localities remain free to combat the problem of underage tobacco use by appropriate means. The judgment of the United States Court of Appeals for the First Circuit is therefore affirmed in part and reversed in part, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KENNEDY, with whom JUSTICE SCALIA joins, concurring in part and concurring in the judgment.

The obvious overbreadth of the outdoor advertising restrictions suffices to invalidate them under the fourth part of the test in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557 (1980). As a result, in my view, there is no need to consider whether the restrictions satisfy the third part of the test, a proposition about which there is considerable doubt. Cf. *post*, at 583–584 (THOMAS, J., concurring in part and concurring in judgment). Neither are we required to consider whether *Central Hudson* should be retained in the face of the substantial objections that can be made to it. See *post*, at 574–582 (opinion of THOMAS, J.). My continuing concerns that the test gives

insufficient protection to truthful, nonmisleading commercial speech require me to refrain from expressing agreement with the Court's application of the third part of *Central Hudson*. See, *e. g.*, *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S. 484, 501–504 (1996) (opinion of STEVENS, J., joined by KENNEDY and GINSBURG, JJ.). With the exception of Part III–B–1, then, I join the opinion of the Court.

JUSTICE THOMAS, concurring in part and concurring in the judgment.

I join the opinion of the Court (with the exception of Part III–B–1) because I agree that the Massachusetts cigarette advertising regulations are pre-empted by the Federal Cigarette Labeling and Advertising Act, 15 U. S. C. § 1331 *et seq.* I also agree with the Court's disposition of the First Amendment challenges to the other regulations at issue here, and I share the Court's view that the regulations fail even the intermediate scrutiny of *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557 (1980). At the same time, I continue to believe that when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as "commercial." See *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S. 484, 518 (1996) (THOMAS, J., concurring in part and concurring in judgment). I would subject all of the advertising restrictions to strict scrutiny and would hold that they violate the First Amendment.

I

At the heart of this litigation is a Massachusetts regulation that imposes a sweeping ban on speech about tobacco products. 940 Code of Mass. Regs. § 21.04(5) (2000), which governs cigarettes and smokeless tobacco, and § 22.06(5), which governs cigars, prohibit all outdoor advertising, all indoor advertising that can be seen from outdoors, and all point-of-sale advertising (even if not visible from outdoors) that is

lower than five feet from the floor.[1] These restrictions are superficially limited in their geographic scope: They apply only within 1,000 feet of "any public playground, playground area in a public park, elementary school or secondary school." § 21.04(5)(a). But the Court of Appeals acknowledged that the zone of prohibition covers as much as 90 percent of the three largest cities in Massachusetts, *Consolidated Cigar Corp.* v. *Reilly*, 218 F. 3d 30, 50 (CA1 2000), so the practical effect is little different from that of a total ban. Cf. *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 812 (2000) ("The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans").

Respondents suggest in passing that the regulations are "zoning-type restrictions" that should receive "the intermediate level of scrutiny traditionally associated with various forms of 'time, place, and manner' regulations." Brief for Respondents 31. We have indeed upheld time, place, and manner regulations that prohibited certain kinds of outdoor signs, see, *e. g.*, *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789 (1984), and we have similarly upheld zoning laws that had the effect of restricting certain kinds of sexually explicit expression, see, *e. g.*, *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41 (1986). But the abiding characteristic of valid time, place, and manner regulations is their content neutrality. See *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791–796 (1989). In *Vincent* the city prohibited all signs on public property, not to sup-

[1] Other regulations prohibit the sale of tobacco products "in any manner other than in a direct, face-to-face exchange," forbid self-service displays, and require that tobacco products be accessible only to store personnel. See §§ 21.04(2)(a), (c)–(d), §§ 22.06(2)(a), (c)–(d). In addition, they prohibit sampling and promotional giveaways. See §§ 21.04(1), 22.06(1). I agree with the Court, see *ante*, at 567–570, that these regulations, which govern conduct rather than expression, should be upheld under the test of *United States* v. *O'Brien*, 391 U. S. 367 (1968).

press the message conveyed by any of the signs, but simply to minimize the esthetic effect of visual clutter. Likewise, the ordinance in *Renton* was aimed not at expression, but at the "secondary effects" caused by adult businesses.

The regulations here are very different. Massachusetts is not concerned with any "secondary effects" of tobacco advertising—it is concerned with the advertising's primary effect, which is to induce those who view the advertisements to purchase and use tobacco products. Cf. *Boos* v. *Barry*, 485 U. S. 312, 321 (1988) ("Listeners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*"). In other words, it seeks to suppress speech about tobacco because it objects to the content of that speech. We have consistently applied strict scrutiny to such content-based regulations of speech. See, *e. g.*, *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 641–643 (1994).

A

There was once a time when this Court declined to give any First Amendment protection to commercial speech. In *Valentine* v. *Chrestensen*, 316 U. S. 52 (1942), the Court went so far as to say that "the Constitution imposes [no] restraint on government as respects purely commercial advertising." *Id.*, at 54. That position was repudiated in *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976), which explained that even speech "which does 'no more than propose a commercial transaction'" is protected by the First Amendment. *Id.*, at 762 (quoting *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U. S. 376, 385 (1973)). Since then, the Court has followed an uncertain course—much of the uncertainty being generated by the malleability of the four-part balancing test of *Central Hudson*. See *44 Liquormart*, 517 U. S., at 520–522 (THOMAS, J., concurring in part and concurring in judgment).

I have observed previously that there is no "philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech." *Id.*, at 522. Indeed, I doubt whether it is even possible to draw a coherent distinction between commercial and noncommercial speech. See *id.*, at 523, n. 4 (citing Kozinski & Banner, Who's Afraid of Commercial Speech, 76 Va. L. Rev. 627 (1990)).[2]

It should be clear that if these regulations targeted anything other than advertising for commercial products—if, for example, they were directed at billboards promoting political candidates—all would agree that the restrictions should be subjected to strict scrutiny. In my view, an asserted government interest in keeping people ignorant by suppressing expression "is *per se* illegitimate and can no more justify regulation of 'commercial' speech than it can justify regulation of 'noncommercial' speech." 517 U. S., at 518 (THOMAS, J., concurring in part and concurring in judgment). That is essentially the interest asserted here, and, adhering to the views I expressed in *44 Liquormart*, I would subject the Massachusetts regulations to strict scrutiny.

B

Even if one accepts the premise that commercial speech generally is entitled to a lower level of constitutional protection than are other forms of speech, it does not follow that the regulations here deserve anything less than strict scrutiny. Although we have recognized several categories of

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[2] Tobacco advertising provides a good illustration. The sale of tobacco products is the subject of considerable political controversy, and not surprisingly, some tobacco advertisements both promote a product and take a stand in this political debate. See Brief for National Association of Convenience Stores as *Amicus Curiae* 20–22. A recent cigarette advertisement, for example, displayed a brand logo next to text reading, "Why do politicians smoke cigars while taxing cigarettes?" App. to Brief for National Association of Convenience Stores as *Amicus Curiae* 2a.

speech that normally receive reduced First Amendment protection, or no First Amendment protection at all, we have never held that the government may regulate speech within those categories in any way that it wishes. Rather, we have said "that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content.*" *R. A. V.* v. *St. Paul*, 505 U. S. 377, 383 (1992). Even when speech falls into a category of reduced constitutional protection, the government may not engage in content discrimination for reasons unrelated to those characteristics of the speech that place it within the category. For example, a city may ban obscenity (because obscenity is an unprotected category, see, *e. g.*, *Roth* v. *United States*, 354 U. S. 476 (1957)), but it may not ban "only those legally obscene works that contain criticism of the city government." *R. A. V.*, *supra*, at 384.

In explaining the distinction between commercial speech and other forms of speech, we have emphasized that commercial speech is both "more easily verifiable by its disseminator" and less likely to be "chilled by proper regulation." *Virginia Bd.*, 425 U. S., at 772, n. 24. These characteristics led us to conclude that, in the context of commercial speech, it is "less necessary to tolerate inaccurate statements for fear of silencing the speaker," and also that it is more "appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive." *Ibid.* Whatever the validity of this reasoning, it is limited to the peculiarly *commercial* harms that commercial speech can threaten—*i. e.*, the risk of deceptive or misleading advertising. As we observed in *R. A. V.*:

> "[A] State may choose to regulate price advertising in one industry but not in others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection) is in its view greater there. But a State may not prohibit

> only that commercial advertising that depicts men in a demeaning fashion." 505 U. S., at 388–389 (citations omitted).

In *44 Liquormart*, several Members of the Court said much the same thing:

> "[W]hen a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands." 517 U. S., at 501 (opinion of STEVENS, J., joined by KENNEDY and GINSBURG, JJ.).

Whatever power the State may have to regulate commercial speech, it may not use that power to limit the content of commercial speech, as it has done here, "for reasons unrelated to the preservation of a fair bargaining process." Such content-discriminatory regulation—like all other content-based regulation of speech—must be subjected to strict scrutiny.

C

In an effort to avoid the implications of these basic principles of First Amendment law, respondents make two principal claims. First, they argue that the regulations target deceptive and misleading speech. See Brief for Respondents 33 ("Petitioners' advertising clearly engenders 'the potential for deception or confusion' that allows for regulation of commercial speech based on its content" (quoting *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 65 (1983))). Second, they argue that the regulations restrict speech that promotes an illegal transaction—*i. e.*, the sale of tobacco to minors. See Brief for Respondents 15 ("The regulations . . . exhibit a close connection to a commercial transaction the State has prohibited").

Neither theory is properly before the Court. For purposes of summary judgment, respondents were willing to as-

sume "that the tobacco advertisements at issue here are truthful, nonmisleading speech about a lawful activity." 218 F. 3d, at 43. Although respondents now claim that they have not conceded this point, see Brief for Respondents 35, n. 17, the fact remains that they did not urge their theories in the lower courts, and in general, we do not consider arguments for affirmance that were not presented below. See, *e. g.*, *Glover* v. *United States*, 531 U. S. 198, 205 (2001). These concessions should make this an easy case, one clearly controlled by *44 Liquormart* and by *Greater New Orleans Broadcasting Assn., Inc.* v. *United States*, 527 U. S. 173 (1999). At all events, even if we were to entertain these arguments, neither is persuasive.

Respondents suggest that tobacco advertising is misleading because "its youthful imagery and . . . sheer ubiquity" leads children to believe "that tobacco use is desirable and pervasive." Brief for Respondents 33; see also Brief for United States as *Amicus Curiae* 7 ("[S]o many children lack the maturity in judgment to resist the tobacco industry's appeals to excitement, glamour, and independence"). This justification is belied, however, by the sweeping overinclusivity of the regulations. Massachusetts has done nothing to target its prohibition to advertisements appealing to "excitement, glamour, and independence"; the ban applies with equal force to appeals to torpor, homeliness, and servility. It has not focused on "youthful imagery"; smokers depicted on the sides of buildings may no more play shuffleboard than they may ride skateboards.

The regulations even prohibit a store from accurately stating the prices at which cigarettes are sold. Such a display could not possibly be misleading, unless one accepts the State's apparent view that the simple existence of tobacco advertisements misleads people into believing that tobacco use is more pervasive than it actually is. The State misunderstands the purpose of advertising. Promoting a product that is not yet pervasively used (or a cause that is not yet

widely supported) is a primary purpose of advertising. Tobacco advertisements would be no more misleading for suggesting pervasive use of tobacco products than are any other advertisements that attempt to expand a market for a product, or to rally support for a political movement. Any inference from the advertisements that businesses would like for tobacco use to be pervasive is entirely reasonable, and advertising that gives rise to that inference is in no way deceptive.

The State also contends that tobacco advertisements may be restricted because they propose an illegal sale of tobacco to minors. A direct solicitation of unlawful activity may of course be proscribed, whether or not it is commercial in nature. See *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969) *(per curiam)*. The State's power to punish speech that solicits or incites crime has nothing to do with the commercial character of the speech. After all, it is often the case that solicitation to commit a crime is entirely noncommercial. The harm that the State seeks to prevent is the harm caused by the unlawful activity that is solicited; it is unrelated to the commercial transaction itself. Thus there is no reason to apply anything other than our usual rule for evaluating solicitation and incitement simply because the speech in question happens to be commercial. See *Carey* v. *Population Services Int'l*, 431 U. S. 678, 701–702 (1977).

Viewed as an effort to proscribe solicitation to unlawful conduct, these regulations clearly fail the *Brandenburg* test. A State may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg*, *supra*, at 447. Even if Massachusetts could prohibit advertisements reading, "Hey kids, buy cigarettes here," these regulations sweep much more broadly than that. They cover "*any* . . . statement or representation . . . the purpose or effect of which is to promote the use or sale" of tobacco products, whether or not the statement is directly or indi-

rectly addressed to minors. 940 Code of Mass. Regs. § 21.03 (2000). On respondents' theory, *all* tobacco advertising may be limited because *some* of its viewers may not legally act on it.

It is difficult to see any stopping point to a rule that would allow a State to prohibit all speech in favor of an activity in which it is illegal for minors to engage. Presumably, the State could ban car advertisements in an effort to enforce its restrictions on underage driving. It could regulate advertisements urging people to vote, because children are not permitted to vote. And, although the Solicitor General resisted this implication of her theory, see Tr. of Oral Arg. 55–56, the State could prohibit advertisements for adult businesses, which children are forbidden to patronize.

At bottom, respondents' theory rests on the premise that an indirect solicitation is enough to empower the State to regulate speech, and that, as petitioners put it, even an advertisement directed at adults "will give any children who may happen to see it the wrong idea and therefore must be suppressed from public view." Brief for Petitioners Lorillard Tobacco Co. et al. in No. 00–596, p. 36. This view is foreign to the First Amendment. "Every idea is an incitement," *Gitlow* v. *New York*, 268 U. S. 652, 673 (1925) (Holmes, J., dissenting), and if speech may be suppressed whenever it might inspire someone to act unlawfully, then there is no limit to the State's censorial power. Cf. *American Booksellers Assn., Inc.* v. *Hudnut*, 771 F. 2d 323 (CA7 1985), aff'd, 475 U. S. 1001 (1986).

There is a deeper flaw in the State's argument. Even if Massachusetts has a valid interest in regulating speech directed at children—who, it argues, may be more easily misled, and to whom the sale of tobacco products is unlawful—it may not pursue that interest at the expense of the free speech rights of adults.

The theory that public debate should be limited in order to protect impressionable children has a long historical pedi-

gree: Socrates was condemned for being "a doer of evil, inasmuch as he corrupts the youth." 1 Dialogues of Plato, Apology 348 (B. Jowett transl., 4th ed. 1953). But the theory has met with a less enthusiastic reception in this Court than it did in the Athenian assembly. In *Butler* v. *Michigan*, 352 U. S. 380 (1957), we struck down a statute restricting the sale of materials "'tending to incite minors to violent or depraved or immoral acts.'" *Id.*, at 381 (quoting then Mich. Penal Code § 343). The effect of the law, we observed, was "to reduce the adult population of Michigan to reading only what is fit for children." 352 U. S., at 383. As Justice Frankfurter colorfully put it, "Surely, this is to burn the house to roast the pig." *Ibid.*

We have held consistently that speech "cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Erznoznik* v. *Jacksonville*, 422 U. S. 205, 213–214 (1975); accord, *Bolger*, 463 U. S., at 74 ("The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox"). To be sure, in *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978), we upheld the Federal Communications Commission's power to regulate indecent but nonobscene radio broadcasts. But *Pacifica* relied heavily on what it considered to be the "special justifications for regulation of the broadcast media that are not applicable to other speakers." *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 868 (1997). It emphasized that radio is "*uniquely* pervasive" and "*uniquely* accessible to children, even those too young to read." *Pacifica*, *supra*, at 748–749 (emphasis added).

Outside of the broadcasting context, we have adhered to the view that "the governmental interest in protecting children from harmful materials" does not "justify an unnecessarily broad suppression of speech addressed to adults." *Reno*, *supra*, at 875; see also *Playboy Entertainment*, 529 U. S., at 814 ("[T]he objective of shielding children does not

suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative"). Massachusetts may not avoid the application of strict scrutiny simply because it seeks to protect children.

II

Under strict scrutiny, the advertising ban may be saved only if it is narrowly tailored to promote a compelling government interest. See, *e. g.*, *id.*, at 813. If that interest could be served by an alternative that is less restrictive of speech, then the State must use that alternative instead. See *ibid.*; *Reno*, *supra*, at 874. Applying this standard, the regulations here must fail.

A

Massachusetts asserts a compelling interest in reducing tobacco use among minors. Applied to adults, an interest in manipulating market choices by keeping people ignorant would not be legitimate, let alone compelling. See *supra*, at 575. But assuming that there is a compelling interest in reducing underage smoking, and that the ban on outdoor advertising promotes this interest, I doubt that the same is true of the ban on point-of-sale advertising below five feet. See 940 Code of Mass. Regs. §§ 21.04(5)(b), 22.06(5)(b) (2000). The Court of Appeals admitted to having "some misgivings about the effectiveness of a restriction that is based on the assumption that minors under five feet tall will not, or will less frequently, raise their view above eye-level," 218 F. 3d, at 51, as well it might have, since respondents have produced no evidence to support this counterintuitive assumption. Obviously even short children can see objects that are taller than they are. Anyway, by the time they are 12½ years old, both the median girl and the median boy are over five feet tall. See U. S. Centers for Disease Control and Prevention, Growth Charts (2000). Thus, there is no reason to believe that this regulation does anything to protect minors from

exposure to tobacco advertising.[3] Far from serving a compelling interest, the ban on displays below five feet seems to lack even a minimally rational relationship to any conceivable interest.

There is also considerable reason to doubt that the restrictions on cigar and smokeless tobacco outdoor advertising promote any state interest. Outdoor advertising for cigars, after all, is virtually nonexistent. Cigar makers use no billboards in Massachusetts, and in fact their nationwide outdoor advertising budget is only about $50,000 per year. See 218 F. 3d, at 49. To the extent outdoor advertising exists, there is no evidence that it is targeted at youth or has a significant effect on youth. The Court of Appeals focused on the State's evidence of a relationship between "tobacco advertising and tobacco use," *id.*, at 48, thus eliding the dearth of evidence showing any relationship between *cigar* advertising and *cigar* use by minors. Respondents principally rely on a National Cancer Institute report on cigar smoking, see Brief for Respondents 39, n. 19. But that report contains only the conclusory assertion that cigars are being "heavily promoted in ways likely to influence adolescent use," and it does not even discuss outdoor advertising, instead focusing on "[e]ndorsements by celebrities," "the re-

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[3] This is not to say that the regulation does nothing at all. As the Court points out, see *ante*, at 565, security concerns require that convenience stores be designed so that the interior of the store is visible from the street. See also Occupational Safety and Health Administration, Recommendations for Workplace Violence Prevention Programs in Late-Night Retail Establishments 6 (1998) ("Shelves should be low enough to assure good visibility throughout the store"). The § 21.04(5)(b) ban on displays below five feet and the § 21.04(5)(a) ban on displays visible from outside the store, combined with these security concerns, would prevent many convenience stores from displaying any tobacco products at all. Thus, despite the State's disclaimers, see Brief for Respondents 30 ("The State, quite clearly, is not trying to suppress altogether the communication of product information to interested consumers"), the restrictions effectively produce a total ban.

surgence of cigar smoking in movies," and "cigar lifestyle magazines such as 'Cigar Aficionado.'" National Cancer Institute, Cigars: Health Effects and Trends, Smoking and Tobacco Control Monograph No. 9, pp. 14–15 (1998), Record, Doc. No. 39, Exh. 67. The report candidly acknowledges that "[a]dditional information is needed to better characterize marketing efforts for cigars" and "to learn the extent to which advertising and promotion for cigars . . . reaches and affects kids." *Id.*, at 216–217. In other words, respondents have adduced no evidence that a ban on cigar advertising will do anything to promote their asserted interest.

Much the same is true of smokeless tobacco. Here respondents place primary reliance on evidence that, in the late 1960's, the U. S. Smokeless Tobacco Company increased its sales through advertising targeted at young males. See Brief for Respondents 39, n. 19. But this does nothing to show that advertising affecting minors is a problem today. The Court invokes the Food and Drug Administration's findings, see *ante*, at 559–560, but the report it cites based its conclusions on the observed "very large increase in the use of smokeless tobacco products by young people." 60 Fed. Reg. 41318 (1995). This premise is contradicted by one of respondents' own studies, which reports a large, steady *decrease* in smokeless tobacco use among Massachusetts high school students during the 1990's. See App. 292. This finding casts some doubt on whether the State's interest in additional regulation is truly compelling. More importantly, because cigarette smoking among high school students has not exhibited such a trend, see *ibid.*, it indicates that respondents' effort to aggregate cigarettes and smokeless tobacco is misguided.

B

In any case, even assuming that the regulations advance a compelling state interest, they must be struck down because they are not narrowly tailored. The Court is correct, see *ante*, at 561–563, that the arbitrary 1,000-foot radius demon-

strates a lack of narrow tailoring, but the problem goes deeper than that. A prohibited zone defined solely by circles drawn around schools and playgrounds is necessarily overinclusive, regardless of the radii of the circles. Consider, for example, a billboard located within 1,000 feet of a school but visible only from an elevated freeway that runs nearby. Such a billboard would not threaten any of the interests respondents assert, but it would be banned anyway, because the regulations take no account of whether the advertisement could even be seen by children. The prohibited zone is even more suspect where, as here, it includes all but 10 percent of the area in the three largest cities in the State.

The loose tailoring of the advertising ban is displayed not only in its geographic scope but also in the nature of the advertisements it affects. The regulations define "advertisement" very broadly; the term includes any "written . . . statement or representation, made by" a person who sells tobacco products, "the purpose or effect of which is to promote the use or sale of the product." 940 Code of Mass. Regs. § 21.03 (2000). Almost everything a business does has the purpose of promoting the sale of its products, so this definition would cover anything a tobacco retailer might say. Some of the prohibited speech would not even be commercial. If a store displayed a sign promoting a candidate for Attorney General who had promised to repeal the tobacco regulations if elected, it probably would be doing so with the long-term purpose of promoting sales, and the display of such a sign would be illegal.

Even if the definition of "advertisement" were read more narrowly so as to require a specific reference to tobacco products, it still would have Draconian effects. It would, for example, prohibit a tobacconist from displaying a sign reading "Joe's Cigar Shop." The effect of this rule is not to make cigars impossible to find; retailers are after all allowed to display a 576-square-inch black-and-white sign reading "Tobacco Products Sold Here." § 22.06(6). Rather, it is to

make individual cigar retailers more difficult to identify by making them change their names. Respondents assert no interest in cigar retailer anonymity, and it is difficult to conceive of any other interest to which this rule could be said to be narrowly tailored.

The regulations fail the narrow tailoring inquiry for another, more fundamental reason. In addition to examining a narrower advertising ban, the State should have examined ways of advancing its interest that do not require limiting speech at all. Here, respondents had several alternatives. Most obviously, they could have directly regulated the conduct with which they were concerned. See, *e. g.*, *Rubin* v. *Coors Brewing Co.*, 514 U. S. 476, 490–491 (1995) (invalidating ban on disclosure of alcohol content on beer labels, in part because the Government could have pursued alternatives such as "directly limiting the alcohol content of beers"); see also *44 Liquormart*, 517 U. S., at 524 (THOMAS, J., concurring in part and concurring in judgment) ("[I]t would seem that directly banning a product (or . . . otherwise restricting its sale in specific ways) would virtually always be at least as effective in discouraging consumption as merely restricting advertising"). Massachusetts already prohibits the sale of tobacco to minors, but it could take steps to enforce that prohibition more vigorously. It also could enact laws prohibiting the purchase, possession, or use of tobacco by minors. And, if its concern is that tobacco advertising communicates a message with which it disagrees, it could seek to counteract that message with "more speech, not enforced silence," *Whitney* v. *California*, 274 U. S. 357, 377 (1927) (Brandeis, J., concurring).

III

Underlying many of the arguments of respondents and their *amici* is the idea that tobacco is in some sense *sui generis*—that it is so special, so unlike any other object of regulation, that application of normal First Amendment principles should be suspended. See, *e. g.*, Brief for Respondents 50

(referring to tobacco use as "one of the State's—and indeed the Nation's—most urgent problems"); Brief for United States as *Amicus Curiae* 19–20 (cataloging the prevalence and the effects of tobacco use); Brief for American Medical Association et al. as *Amici Curiae* 24 (advocating "the authority of governments to protect children from uniquely dangerous messages"). Smoking poses serious health risks, and advertising may induce children (who lack the judgment to make an intelligent decision about whether to smoke) to begin smoking, which can lead to addiction. The State's assessment of the urgency of the problem posed by tobacco is a policy judgment, and it is not this Court's place to second-guess it. Nevertheless, it seems appropriate to point out that to uphold the Massachusetts tobacco regulations would be to accept a line of reasoning that would permit restrictions on advertising for a host of other products.

Tobacco use is, we are told, "the single leading cause of preventable death in the United States." Brief for United States as *Amicus Curiae* 19. The *second* largest contributor to mortality rates in the United States is obesity. Koplan & Dietz, Caloric Imbalance and Public Health Policy, 282 JAMA 1579 (1999). It is associated with increased incidence of diabetes, hypertension, and coronary artery disease, *ibid.*, and it represents a public health problem that is rapidly growing worse. See Mokdad et al., The Spread of the Obesity Epidemic in the United States, 1991–1998, 282 JAMA 1519 (1999). Although the growth of obesity over the last few decades has had many causes, a significant factor has been the increased availability of large quantities of high-calorie, high-fat foods. See Hill, Environmental Contributions to the Obesity Epidemic, 280 Science 1371 (1998). Such foods, of course, have been aggressively marketed and promoted by fast food companies. See Nestle & Jacobson, Halting the Obesity Epidemic, U. S. Dept. of Health and Human Services, 115 Public Health Reports 12, 18 (2000).

Respondents say that tobacco companies are covertly targeting children in their advertising. Fast food companies do so openly. See, *e. g.*, Kramer, McD's Steals Another Toy from BK, Advertising Age, Nov. 15, 1999, p. 1 (describing a McDonald's promotional campaign); Lucas, BK Takes Choice Message to Kids, Adweek, June 29, 1998, p. 4 (describing a Burger King promotional campaign). Moreover, there is considerable evidence that they have been successful in changing children's eating behavior. See Borzekowski & Robinson, The 30-Second Effect, 101 J. Am. Dietetic Assn. 42 (2001); Taras, Sallis, Patterson, Nader, & Nelson, Television's Influence on Children's Diet and Physical Activity, 10 J. Dev. & Behav. Pediatrics 176 (1989). The effect of advertising on children's eating habits is significant for two reasons. First, childhood obesity is a serious health problem in its own right. Troiano & Flegal, Overweight Children and Adolescents, 101 Pediatrics 497 (1998). Second, eating preferences formed in childhood tend to persist in adulthood. Birch & Fisher, Development of Eating Behaviors Among Children and Adolescents, 101 Pediatrics 539 (1998). So even though fast food is not addictive in the same way tobacco is, children's exposure to fast food advertising can have deleterious consequences that are difficult to reverse.

To take another example, the third largest cause of preventable deaths in the United States is alcohol. McGinnis & Foege, Actual Causes of Death in the United States, 270 JAMA 2207, 2208 (1993). Alcohol use is associated with tens of thousands of deaths each year from cancers and digestive diseases. *Id.*, at 2208–2209. And the victims of alcohol use are not limited to those who drink alcohol. In 1996, over 17,000 people were killed, and over 321,000 people were injured, in alcohol-related car accidents. U. S. Dept. of Justice, Alcohol and Crime 13 (1998). Each year, alcohol is involved in several million violent crimes, including almost 200,000 sexual assaults. *Id.*, at 3–4.

Although every State prohibits the sale of alcohol to those under age 21, much alcohol advertising is viewed by children. Federal Trade Commission, J. Evans & R. Kelly, Self-Regulation in the Alcohol Industry (Sept. 1999); Grube & Wallack, Television Beer Advertising and Drinking Knowledge, Beliefs, and Intentions among Schoolchildren, 84 Am. J. Pub. Health 254 (1994). Not surprisingly, there is considerable evidence that exposure to alcohol advertising is associated with underage drinking. See Atkin, Survey and Experimental Research on Effects of Alcohol Advertising, in The Effects of the Mass Media on the Use and Abuse of Alcohol 39 (S. Martin ed. 1995); Madden & Grube, The Frequency and Nature of Alcohol and Tobacco Advertising in Televised Sports, 1990 through 1992, 84 Am. J. Pub. Health 297 (1994).

Like underage tobacco use, underage drinking has effects that cannot be undone later in life. Those who begin drinking early are much more likely to become dependent on alcohol. Indeed, the probability of lifetime alcohol dependence decreases approximately 14 percent with each additional year of age at which alcohol is first used. Grant & Dawson, Age at Onset of Alcohol Use and its Association with DSM–IV Alcohol Abuse and Dependence, 9 J. Substance Abuse 103, 108 (1997). And obviously the effects of underage drinking are irreversible for the nearly 1,700 Americans killed each year by teenage drunk drivers. See National Highway Traffic Safety Administration, 1998 Youth Fatal Crash and Alcohol Facts.

Respondents have identified no principle of law or logic that would preclude the imposition of restrictions on fast food and alcohol advertising similar to those they seek to impose on tobacco advertising. Cf. Tr. of Oral Arg. 56–57. In effect, they seek a "vice" exception to the First Amendment. No such exception exists. See *44 Liquormart*, 517 U. S., at 513–514 (opinion of STEVENS, J., joined by KENNEDY, THOMAS, and GINSBURG, JJ.). If it did, it would have almost no limit, for "any product that poses some threat to

public health or public morals might reasonably be characterized by a state legislature as relating to 'vice activity.'" *Id.*, at 514. That is why "a 'vice' label that is unaccompanied by a corresponding prohibition against the commercial behavior at issue fails to provide a principled justification for the regulation of commercial speech about that activity." *Ibid.*

No legislature has ever sought to restrict speech about an activity it regarded as harmless and inoffensive. Calls for limits on expression always are made when the specter of some threatened harm is looming. The identity of the harm may vary. People will be inspired by totalitarian dogmas and subvert the Republic. They will be inflamed by racial demagoguery and embrace hatred and bigotry. Or they will be enticed by cigarette advertisements and choose to smoke, risking disease. It is therefore no answer for the State to say that the makers of cigarettes are doing harm: perhaps they are. But in that respect they are no different from the purveyors of other harmful products, or the advocates of harmful ideas. When the State seeks to silence them, they are all entitled to the protection of the First Amendment.

JUSTICE SOUTER, concurring in part and dissenting in part.

I join Parts I, II–C, II–D, III–A, III–B–1, III–C, and III–D of the Court's opinion. I join Part I of the opinion of JUSTICE STEVENS concurring in part, concurring in the judgment in part, and dissenting in part. I respectfully dissent from Part III–B–2 of the opinion of the Court, and like JUSTICE STEVENS would remand for trial on the constitutionality of the 1,000-foot limit.

JUSTICE STEVENS, with whom JUSTICE GINSBURG and JUSTICE BREYER join, and with whom JUSTICE SOUTER joins as to Part I, concurring in part, concurring in the judgment in part, and dissenting in part.

This suit presents two separate sets of issues. The first—involving pre-emption—is straightforward. The second—

involving the First Amendment—is more complex. Because I strongly disagree with the Court's conclusion that the Federal Cigarette Labeling and Advertising Act of 1965 (FCLAA or Act), 15 U. S. C. § 1331 *et seq.*, as amended, precludes States and localities from regulating the location of cigarette advertising, I dissent from Parts II–A and II–B of the Court's opinion. On the First Amendment questions, I agree with the Court both that the outdoor advertising restrictions imposed by Massachusetts serve legitimate and important state interests and that the record does not indicate that the measures were properly tailored to serve those interests. Because the present record does not enable us to adjudicate the merits of those claims on summary judgment, I would vacate the decision upholding those restrictions and remand for trial on the constitutionality of the outdoor advertising regulations. Finally, because I do not believe that either the point-of-sale advertising restrictions or the sales practice restrictions implicate significant First Amendment concerns, I would uphold them in their entirety.

I

As the majority acknowledges, *ante*, at 541–542, under prevailing principles, any examination of the scope of a pre-emption provision must "'start with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.'" *Cipollone* v. *Liggett Group, Inc.*, 505 U. S. 504, 516 (1992) (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947)); see also, *e. g.*, *California Div. of Labor Standards Enforcement* v. *Dillingham Constr., N. A., Inc.*, 519 U. S. 316, 325 (1997); *Medtronic, Inc.* v. *Lohr*, 518 U. S. 470, 475 (1996). As the regulations at issue in this suit implicate two powers that lie at the heart of the States' traditional police power—the power to regulate land usage and the power to protect the health and safety of minors—our precedents require that the Court construe the pre-emption provision "narrow[ly]." *Id.*, at 485;

see also *Cipollone*, 505 U. S., at 518. If Congress' intent to pre-empt a particular category of regulation is ambiguous, such regulations are not pre-empted.[1]

The text of the pre-emption provision must be viewed in context, with proper attention paid to the history, structure, and purpose of the regulatory scheme in which it appears. See, *e. g.*, *Medtronic*, 518 U. S., at 484–486; *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U. S. 645, 655–656 (1995); *Cipollone*, 505 U. S., at 513–515, 519–520, 529, 530, n. 27; accord, *ante*, at 542.[2] An assessment of the scope of a pre-emption provision must give effect to a "reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Medtronic*, 518 U. S., at 486.

This task, properly performed, leads inexorably to the conclusion that Congress did not intend to pre-empt state and local regulations of the location of cigarette advertising when it adopted the provision at issue in this suit. In both 1965 and 1969, Congress made clear the purposes of its regulatory

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[1] See, *e. g.*, *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 146–147 (1963) ("[W]e are not to conclude that Congress legislated the ouster of this [state] statute . . . in the absence of an unambiguous congressional mandate to that effect"); *Cipollone*, 505 U. S., at 533 (Blackmun, J., joined by KENNEDY and SOUTER, JJ., concurring in part, concurring in judgment in part, and dissenting in part) ("The principles of federalism and respect for state sovereignty that underlie the Court's reluctance to find pre-emption where Congress has not spoken directly to the issue apply with equal force where Congress has spoken, though ambiguously. In such cases, the question is not whether Congress intended to pre-empt state regulation, but to what extent. We do not, absent unambiguous evidence, infer a scope of pre-emption beyond that which clearly is mandated by Congress' language" (emphasis deleted)).

[2] Cf. *Central Hanover Bank & Trust Co.* v. *Commissioner*, 159 F. 2d 167, 169 (CA2 1947) (L. Hand, J.) ("There is no more likely way to misapprehend the meaning of language—be it in a constitution, a statute, a will or a contract—than to read the words literally, forgetting the object which the document as a whole is meant to secure").

endeavor, explaining with precision the federal policies motivating its actions. According to the Acts, Congress adopted a "comprehensive Federal Program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health," for two reasons: (1) to inform the public that smoking may be hazardous to health and (2) to ensure that commerce and the interstate economy not be "impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." 15 U. S. C. § 1331.

In order to serve the second purpose it was necessary to pre-empt state regulation of the content of both cigarette labels and cigarette advertising. If one State required the inclusion of a particular warning on the package of cigarettes while another State demanded a different formulation, cigarette manufacturers would have been forced into the difficult and costly practice of producing different packaging for use in different States. To foreclose the waste of resources that would be entailed by such a patchwork regulatory system, Congress expressly precluded other regulators from requiring the placement on cigarette packaging of any "statement relating to smoking and health." § 1334(a). Similar concerns applied to cigarette advertising. If different regulatory bodies required that different warnings or statements be used when cigarette manufacturers advertised their products, the text and layout of a company's ads would have had to differ from locale to locale. The resulting costs would have come with little or no health benefit. Moreover, given the nature of publishing, it might well have been the case that cigarette companies would not have been able to advertise in national publications without violating the laws of some jurisdictions. In response to these concerns, Congress adopted a parallel provision pre-empting state and local regulations requiring inclusion in cigarette advertising of any "statement relating to smoking and health." § 1334(b) (1970 ed.) (amended 1970).

There was, however, no need to interfere with state or local zoning laws or other regulations prescribing limitations on the location of signs or billboards. Laws prohibiting a cigarette company from hanging a billboard near a school in Boston in no way conflict with laws permitting the hanging of such a billboard in other jurisdictions. Nor would such laws even impose a significant administrative burden on would-be advertisers, as the great majority of localities impose general restrictions on signage, thus requiring advertisers to examine local law before posting signs whether or not cigarette-specific laws are pre-empted. See *Greater N. Y. Metropolitan Food Council, Inc.* v. *Giuliani*, 195 F. 3d 100, 109 (CA2 1999) ("Divergent local zoning restrictions on the location of sign advertising are a commonplace feature of the national landscape and cigarette advertisers have always been bound to observe them"). Hence, it is unsurprising that Congress did not include any provision in the 1965 Act pre-empting location restrictions.

The Public Health Cigarette Smoking Act of 1969 (1969 Act), § 2, 84 Stat. 87, made two important changes in the pre-emption provision. First, it limited the applicability of the advertising prong to States and localities, paving the way for further federal regulation of cigarette advertising. FCLAA, § 4. Second, it expanded the scope of the advertising pre-emption provision. Where previously States were prohibited from requiring particular statements in cigarette advertising based on health concerns, they would henceforth be prohibited from imposing any "requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion" of cigarettes. § 5(b), 15 U. S. C. § 1334(b).[3]

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[3] In *Cipollone* v. *Liggett Group, Inc.*, 505 U. S. 504, 521 (1992), we held that one of the consequences of this change in language was that after 1969 the statute pre-empts some common-law actions.

Ripped from its context, this provision could theoretically be read as a breathtaking expansion of the limitations imposed by the 1965 Act. However, both our precedents and common sense require us to read statutory provisions—and, in particular, pre-emption clauses—in the context of both their neighboring provisions and of the history and purpose of the statutory scheme. See *supra*, at 592. When so viewed, it is quite clear that the 1969 amendments were intended to expand the provision to capture a narrow set of content regulations that would have escaped pre-emption under the prior provision, not to fundamentally reorder the division of regulatory authority between the Federal and State Governments.

All signs point inescapably to the conclusion that Congress only intended to pre-empt content regulations in the 1969 Act. It is of crucial importance that, in making modifications of the pre-emption provision, Congress did not alter the statement laying out the federal policies the provision was intended to serve. See 15 U. S. C. § 1331. To this day, the stated federal policies in this area are (1) to inform the public of the dangers of cigarette smoking and (2) to protect the cigarette companies from the burdens of confusing and contradictory state regulations of their labels and advertisements. See *ibid.* The retention of this provision unchanged is strong evidence that Congress' only intention in expanding the pre-emption clause was to capture forms of content regulation that had fallen through the cracks of the prior provision—for example, state laws prohibiting cigarette manufacturers from making particular claims in their advertising or requiring them to utilize specified layouts or include particular graphics in their marketing.[4]

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[4] Because of the nature of magazine publishing and distribution, it is conceivable that a State or locality might cause the kind of regulatory confusion the statute was drafted to prevent by adopting a law prohibiting the advertising of cigarettes in any publication distributed within its

The legislative history of the provision also supports such a reading. The record does not contain any evidence that Congress intended to expand the scope of pre-emption beyond content restrictions.[5] To the contrary, the Senate Report makes it clear that the changes merely "clarified" the scope of the original provision. S. Rep. No. 91–566, p. 12 (1969). Even as amended, Congress perceived the provision as "narrowly phrased" and emphasized that its purpose is to "avoid the chaos created by a multiplicity of conflicting regulations." *Ibid.* According to the Senate Report, the changes "in no way affect the power of any state or political subdivision of any state with respect to . . . the sale of cigarettes to minors . . . or similar police regulations." *Ibid.*

In analyzing the scope of the pre-emption provision, the Courts of Appeals have almost uniformly concluded that state and local laws regulating the location of billboards and signs are not pre-empted. See *Consolidated Cigar Corp.* v. *Reilly*, 218 F. 3d 30, 39–41 (CA1 2000) (case below); *Greater New York Metropolitan Food Council, Inc.* v. *Giuliani*, 195 F. 3d 100, 104–110 (CA2 1999); *Federation of Advertising Industry Representatives, Inc.* v. *Chicago*, 189 F. 3d 633,

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boundaries. There is at least a modicum of support for the suggestion that Congress may have intended the pre-emption of such restrictions. See *id.*, at 515, n. 11 (noting that California was considering such a ban at the time Congress was considering the 1969 Act). However, the concerns posed by the diverse regulation of national publications are not present with regard to the local regulation of the location of signs and billboards.

[5] At one point, the Court briefly argues that it would be wrong to conclude that Congress intended to preclude only content restrictions, because it imposed a location restriction (a ban on television and radio advertising) in another provision of the same bill. See *ante*, at 548–549. This argument is something of a non sequitur. The fact that Congress, in adopting a comprehensive legislative package, chose to impose a federal location restriction for a national medium has no bearing on whether, in a separate provision, the Legislature intended to strip States and localities of the authority to impose location restrictions for purely local advertising media.

636–640 (CA7 1999); *Penn Advertising of Baltimore, Inc.* v. *Mayor and City Council of Baltimore*, 63 F. 3d 1318 (CA4 1995); contra, *Lindsey* v. *Tacoma-Pierce Cty. Health Dept.*, 195 F. 3d 1065 (CA9 1999). The decisions in those cases relied heavily upon our discussion of the same pre-emption provision in *Cipollone*, 505 U. S., at 515–524. In *Cipollone*, while the Members of the Court expressed three different opinions concerning the scope of pre-emption mandated by the provision, those differences related entirely to which, if any, of the plaintiff's claims based on the *content* of the defendants' advertising were pre-empted by § 5. Nary a word in any of the three *Cipollone* opinions supports the thesis that § 5 should be interpreted to pre-empt state regulation of the location of signs advertising cigarettes. Indeed, seven of the nine Justices subscribed to opinions that explicitly tethered the scope of the pre-emption provision to Congress' concern with "diverse, nonuniform, and confusing cigarette labeling and advertising regulations." *Id.*, at 519; *id.*, at 534, 541 (opinion of Blackmun, J., joined by KENNEDY and SOUTER, JJ.).

I am firmly convinced that, when Congress amended the pre-emption provision in 1969, it did not intend to expand the application of the provision beyond content regulations.[6]

[6] Petitioners suggest in passing that Massachusetts' regulation amounts to a "near-total ba[n]," Brief for Petitioners Lorillard Tobacco Co. et al. in No. 00–596, p. 22, and thus is a *de facto* regulation of the content of cigarette ads. But we need not consider today the circumstances in which location restrictions approximating a total ban might constitute regulation of content and thus be pre-empted by the Act, because petitioners have failed to introduce sufficient evidence to create a genuine issue as to that claim. Petitioners introduced maps purporting to show that cigarette advertising is barred in 90.6% of Boston proper, 87.8% of Worcester, and 88.8% of Springfield. See App. 165–167. But the maps do not distinguish between the area restricted due to the regulation at issue here and the area restricted due to pre-existing regulations, such as general zoning requirements applicable to all outdoor advertising. Nor do the maps show the percentage (with respect to either area or population) of the State that is off limits to cigarette advertising; they cover only three cities

I, therefore, find the conclusion inescapable that the zoning regulation at issue in this suit is not a "requirement or prohibition . . . with respect to . . . advertising" within the meaning of the 1969 Act.[7] Even if I were not so convinced, however, I would still dissent from the Court's conclusion with regard to pre-emption, because the provision is, at the very least, ambiguous. The historical record simply does not reflect that it was Congress' "'clear and manifest purpose,'" *id.*, at 516, to pre-empt attempts by States to utilize their traditional zoning authority to protect the health and welfare of minors. Absent such a manifest purpose, Massachusetts and its sister States retain their traditional police powers.[8]

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containing approximately 14% of the State's population. See U. S. Census Bureau, Statistical Abstract of the United States 28, 47, 49 (1999) (providing population figures for 1998). The area in which cigarette advertising is restricted is likely to be considerably less in less densely populated portions of the State. And even on the interpretation of this data most favorable to petitioners, the Massachusetts regulation still permits indoor and outdoor cigarette advertising in at least 10% of the geographical area of the State. In short, the regulation here is not the equivalent of a total ban on cigarette advertising.

[7] Hence, while I agree in large part with the substance of the arguments proffered by the respondents and the United States on the pre-emption issue, I reject their conclusion that the content/location distinction finds expression in the limiting phrase "based on smoking and health." See Brief for Respondents 20; Brief for United States as *Amicus Curiae* 5; accord, *Penn Advertising of Baltimore, Inc.* v. *Mayor and City Council of Baltimore*, 63 F. 3d 1318 (CA4 1995). Instead, I would follow the First, Second, and Seventh Circuits in concluding that a statute regulating the location of advertising is not a "requirement or prohibition . . . with respect to . . . advertising" within the meaning of the 1969 Act. See *Consolidated Cigar Corp.* v. *Reilly*, 218 F. 3d 30, 39–41 (CA1 2000) (case below); *Greater N. Y. Metropolitan Food Council, Inc.* v. *Giuliani*, 195 F. 3d 100, 104–110 (CA2 1999); *Federation of Advertising Industry Representatives, Inc.* v. *Chicago*, 189 F. 3d 633, 636–640 (CA7 1999).

[8] The Court's holding that federal law precludes States and localities from protecting children from dangerous products within 1,000 feet of a school is particularly ironic given the Court's conclusion six years ago that

II

On the First Amendment issues raised by petitioners, my disagreements with the majority are less significant. I would, however, reach different dispositions as to the 1,000-foot rule and the height restrictions for indoor advertising, and my evaluation of the sales practice restrictions differs from the Court's.

The 1,000-Foot Rule

I am in complete accord with the Court's analysis of the importance of the interests served by the advertising restrictions. As the Court lucidly explains, few interests are more "compelling," *ante*, at 564, than ensuring that minors do not become addicted to a dangerous drug before they are able to make a mature and informed decision as to the health risks associated with that substance. Unlike other products sold for human consumption, tobacco products are addictive and ultimately lethal for many long-term users. When that interest is combined with the State's concomitant concern for the effective enforcement of its laws regarding the sale of tobacco to minors, it becomes clear that Massachusetts' regulations serve interests of the highest order and are, therefore, immune from any ends-based challenge, whatever level of scrutiny one chooses to employ.

Nevertheless, noble ends do not save a speech-restricting statute whose means are poorly tailored. Such statutes

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the Federal Government lacks the constitutional authority to impose a similarly motivated ban. See *United States* v. *Lopez*, 514 U. S. 549 (1995). Despite the absence of any identified federal interest in creating "an invisible federal zone extending 1,000 feet beyond the (often irregular) boundaries of the school property," as the majority construes it today, the "statute now before us forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise," *id.*, at 583 (KENNEDY, J., concurring). I wonder why a Court sensitive to federalism concerns would adopt such a strange construction of statutory language whose quite different purpose Congress took pains to explain.

may be invalid for two different reasons. First, the means chosen may be insufficiently related to the ends they purportedly serve. See, *e. g.*, *Rubin* v. *Coors Brewing Co.*, 514 U. S. 476 (1995) (striking a statute prohibiting beer labels from displaying alcohol content because the provision did not significantly forward the government's interest in the health, safety, and welfare of its citizens). Alternatively, the statute may be so broadly drawn that, while effectively achieving its ends, it unduly restricts communications that are unrelated to its policy aims. See, *e. g.*, *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 812 (2000) (striking a statute intended to protect children from indecent television broadcasts, in part because it constituted "a significant restriction of communication between speakers and willing adult listeners"). The second difficulty is most frequently encountered when government adopts measures for the protection of children that impose substantial restrictions on the ability of adults to communicate with one another. See, *e. g.*, *Playboy Entertainment Group, Inc.*, *supra*; *Reno* v. *American Civil Liberties Union*, 521 U. S. 844 (1997); *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115 (1989).

To my mind, the 1,000-foot rule does not present a tailoring problem of the first type. For reasons cogently explained in our prior opinions and in the opinion of the Court, we may fairly assume that advertising stimulates consumption and, therefore, that regulations limiting advertising will facilitate efforts to stem consumption.[9] See, *e. g.*, *Rubin*, 514 U. S., at 487; *United States* v. *Edge Broadcasting Co.*, 509 U. S. 418, 434 (1993); *ante*, at 557. Furthermore, if the government's intention is to limit consumption by a particular segment of the community—in this case, minors—it is

[9] Moreover, even if it were our practice to require a particularized showing of the effects of advertising on consumption, the respondents have met that burden in this suit. See *ante*, at 557–561 (summarizing the evidence).

appropriate, indeed necessary, to tailor advertising restrictions to the areas where that segment of the community congregates—in this case, the area surrounding schools and playgrounds.

However, I share the majority's concern as to whether the 1,000-foot rule unduly restricts the ability of cigarette manufacturers to convey lawful information to adult consumers. This, of course, is a question of line-drawing. While a ban on all communications about a given subject would be the most effective way to prevent children from exposure to such material, the State cannot by fiat reduce the level of discourse to that which is "fit for children." *Butler* v. *Michigan*, 352 U. S. 380, 383 (1957); cf. *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 74 (1983) ("The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox"). On the other hand, efforts to protect children from exposure to harmful material will undoubtedly have some spillover effect on the free speech rights of adults. See, *e. g.*, *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 749–750, and n. 28 (1978).

Finding the appropriate balance is no easy matter. Though many factors plausibly enter the equation when calculating whether a child-directed location restriction goes too far in regulating adult speech, one crucial question is whether the regulatory scheme leaves available sufficient "alternative avenues of communication." *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 50 (1986); *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 819 (1984) (Brennan, J., dissenting); accord, *ante*, at 563. Because I do not think the record contains sufficient information to enable us to answer that question, I would vacate the award of summary judgment upholding the 1,000-foot rule and remand for trial on that issue. Therefore, while I agree with the majority that the Court of Appeals did not sufficiently consider the implications of the 1,000-foot rule for the lawful communication of adults, see *ante*, at 561–566,

I dissent from the disposition reflected in Part III–B–2 of the Court's opinion.

There is no doubt that the 1,000-foot rule prohibits cigarette advertising in a substantial portion of Massachusetts' largest cities. Even on that question, however, the parties remain in dispute as to the percentage of these urban areas that is actually off limits to tobacco advertising. See *ante*, at 562. Moreover, the record is entirely silent on the impact of the regulation in other portions of the Commonwealth. The dearth of reliable statistical information as to the scope of the ban is problematic.

More importantly, the Court lacks sufficient qualitative information as to the areas where cigarette advertising is prohibited and those where it is permitted. The fact that 80% or 90% of an urban area is unavailable to tobacco advertisements may be constitutionally irrelevant if the available areas are so heavily trafficked or so central to the city's cultural life that they provide a sufficient forum for the propagation of a manufacturer's message. One electric sign in Times Square or at the foot of the Golden Gate Bridge may be seen by more potential customers than a hundred signs dispersed in residential neighborhoods.

Finally, the Court lacks information as to other avenues of communication available to cigarette manufacturers and retailers. For example, depending on the answers to empirical questions on which we lack data, the ubiquity of print advertisements hawking particular brands of cigarettes might suffice to inform adult consumers of the special advantages of the respective brands. Similarly, print advertisements, circulars mailed to people's homes, word of mouth, and general information may or may not be sufficient to imbue the adult population with the knowledge that particular stores, chains of stores, or types of stores sell tobacco products.[10]

[10] As the above observations indicate, the analysis as to whether the 1,000-foot rule impermissibly curtails speech between adults will require a particularized analysis that may well ask slightly different questions—

In granting summary judgment for the respondents, the District Judge treated the First Amendment issues in this suit as pure questions of law and stated that "there are no material facts in dispute concerning these issues." 84 F. Supp. 2d 180, 183 (Mass. 2000). With due respect, I disagree. While the ultimate question before us is one of law, the answer to that question turns on complicated factual questions relating to the practical effects of the regulations. As the record does not reveal the answer to these disputed questions of fact, the court should have denied summary judgment to both parties and allowed the parties to present further evidence.

I note, moreover, that the alleged "overinclusivity" of the advertising regulations, *ante*, at 578 (THOMAS, J., concurring in part and concurring in judgment), while relevant to whether the regulations are narrowly tailored, does not "beli[e]" the claim that tobacco advertising imagery misleads children into believing that smoking is healthy, glamorous, or sophisticated, *ibid.* See Brief for American Legacy Foundation as *Amicus Curiae* 4–5, and nn. 9, 10; Brief for City of Los Angeles et al. as *Amici Curiae* 4 (documenting charge that advertisements for cigarettes and smokeless tobacco target underage smokers). For purposes of summary judgment, the State conceded that the tobacco companies' advertising concerns lawful activity and is not misleading. Under the Court's disposition of the cases today, the State remains free to proffer evidence that the advertising is in fact misleading. See *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 771 (1976) ("[M]uch commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem"). I would vacate the grant of summary judgment to respondents on this issue and remand for further proceedings.

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and conceivably could reach different results—with regard to the constitutionality of the restrictions as applied to manufacturers and retailers.

The Sales Practice and Indoor Advertising Restrictions

After addressing petitioners' challenge to the sales practice restrictions imposed by the Massachusetts statute, the Court concluded that these provisions did not violate the First Amendment. I concur in that judgment, but write separately on this issue to make two brief points.

First, I agree with the District Court and the Court of Appeals that the sales practice restrictions are best analyzed as regulating conduct, not speech. See 218 F. 3d, at 53. While the decision how to display one's products no doubt serves a marginal communicative function, the same can be said of virtually any human activity performed with the hope or intention of evoking the interest of others. This Court has long recognized the need to differentiate between legislation that targets expression and legislation that targets conduct for legitimate non-speech-related reasons but imposes an incidental burden on expression. See, *e. g.*, *United States* v. *O'Brien*, 391 U. S. 367 (1968). However difficult that line may be to draw, it seems clear to me that laws requiring that stores maintain items behind counters and prohibiting self-service displays fall squarely on the conduct side of the line. Restrictions as to the accessibility of dangerous or legally restricted products are a common feature of the regulatory regime governing American retail stores. I see nothing the least bit constitutionally problematic in requiring individuals to ask for the assistance of a salesclerk in order to examine or purchase a handgun, a bottle of penicillin, or a package of cigarettes.

Second, though I admit the question is closer, I would, for similar reasons, uphold the regulation limiting tobacco advertising in certain retail establishments to the space five feet or more above the floor.[11] When viewed in isolation, this provision appears to target speech. Further, to the ex-

[11] This ban only applies to stores located within 1,000 feet of a school or playground and contains an exception for adult-only establishments. See *ante*, at 535, 536.

tent that it does target speech it may well run into constitutional problems, as the connection between the ends the statute purports to serve and the means it has chosen are dubious. Nonetheless, I am ultimately persuaded that the provision is unobjectionable because it is little more than an adjunct to the other sales practice restrictions. As the Commonwealth of Massachusetts can properly legislate the placement of products and the nature of displays in its convenience stores, I would not draw a distinction between such restrictions and height restrictions on related product advertising. I would accord the Commonwealth some latitude in imposing restrictions that can have only the slightest impact on the ability of adults to purchase a poisonous product and may save some children from taking the first step on the road to addiction.

III

Because I strongly disagree with the Court's conclusion on the pre-emption issue, I dissent from Parts II–A and II–B of its opinion. Though I agree with much of what the Court has to say about the First Amendment, I ultimately disagree with its disposition or its reasoning on each of the regulations before us.[12]

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[12] Reflecting my partial agreement with the Court, I join Parts I, II–C, II–D, and III–B–1 and concur in the judgment reflected in Part III–D.

Syllabus

PALAZZOLO *v.* RHODE ISLAND ET AL.

CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

No. 99–2047. Argued February 26, 2001—Decided June 28, 2001

In order to acquire the waterfront parcel of Rhode Island land that is here at issue, petitioner and associates formed Shore Gardens, Inc. (SGI), in 1959. After SGI purchased the property petitioner bought out his associates and became the sole shareholder. Most of the property was then, and is now, salt marsh subject to tidal flooding. The wet ground and permeable soil would require considerable fill before significant structures could be built. Over the years, SGI's intermittent applications to develop the property were rejected by various government agencies. After 1966, no further applications were made for over a decade. Two intervening events, however, become important to the issues presented. First, in 1971, the State created respondent Rhode Island Coastal Resources Management Council (Council) and charged it with protecting the State's coastal properties. The Council's regulations, known as the Rhode Island Coastal Resources Management Program (CRMP), designated salt marshes like those on SGI's property as protected "coastal wetlands" on which development is greatly limited. Second, in 1978, SGI's corporate charter was revoked, and title to the property passed to petitioner as the corporation's sole shareholder. In 1983, petitioner applied to the Council for permission to construct a wooden bulkhead and fill his entire marshland area. The Council rejected the application, concluding, *inter alia*, that it would conflict with the CRMP. In 1985, petitioner filed a new application with the Council, seeking permission to fill 11 of the property's 18 wetland acres in order to build a private beach club. The Council rejected this application as well, ruling that the proposal did not satisfy the standards for obtaining a "special exception" to fill salt marsh, whereby the proposed activity must serve a compelling public purpose. Subsequently, petitioner filed an inverse condemnation action in Rhode Island Superior Court, asserting that the State's wetlands regulations, as applied by the Council to his parcel, had taken the property without compensation in violation of the Fifth and Fourteenth Amendments. The suit alleged the Council's action deprived him of "all economically beneficial use" of his property, resulting in a total taking requiring compensation under *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, and sought $3,150,000 in damages, a figure derived from an appraiser's estimate as to the value of a 74-lot residential subdivision on the property. The court ruled against

petitioner, and the State Supreme Court affirmed, holding that (1) petitioner's takings claim was not ripe; (2) he had no right to challenge regulations predating 1978, when he succeeded to legal ownership of the property; (3) he could not assert a takings claim based on the denial of all economic use of his property in light of undisputed evidence that he had $200,000 in development value remaining on an upland parcel of the property; and (4) because the regulation at issue predated his acquisition of title, he could have had no reasonable investment-backed expectation that he could develop his property, and, therefore, he could not recover under *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104, 124.

Held:

1. This case is ripe for review. Pp. 617–626.

(a) A takings claim challenging application of land-use regulations is not ripe unless the agency charged with implementing the regulations has reached a final decision regarding their application to the property at issue. *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U. S. 172, 186. A final decision does not occur until the responsible agency determines the extent of permitted development on the land. *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U. S. 340, 351. Petitioner obtained such a final decision when the Council denied his 1983 and 1985 applications. The State Supreme Court erred in ruling that, notwithstanding those denials, doubt remained as to the extent of development the Council would allow on petitioner's parcel due to his failure to explore other uses for the property that would involve filling substantially less wetlands. This is belied by the unequivocal nature of the wetland regulations at issue and by the Council's application of the regulations to the subject property. The CRMP permits the Council to grant a special exception to engage in a prohibited use only where a "compelling public purpose" is served. The proposal to fill the entire property was not accepted under Council regulations and did not qualify for the special exception. The Council determined the use proposed in the second application (the beach club) did not satisfy the "compelling public purpose" standard. There is no indication the Council would have accepted the application had the proposed club occupied a smaller surface area. To the contrary, it ruled that the proposed activity was not a "compelling public purpose." Although a landowner may not establish a taking before the land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation, *e. g.*, *MacDonald*, *supra*, at 342, once it becomes clear that the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened. Here, the Council's decisions make plain that

it interpreted its regulations to bar petitioner from engaging in any filling or development on the wetlands. Further permit applications were not necessary to establish this point. Pp. 618–621.

(b) Contrary to the State Supreme Court's ruling, petitioner's claim is not unripe by virtue of his failure to seek permission for a use of the property that would involve development only of its upland portion. It is true that there was uncontested testimony that an upland site would have an estimated value of $200,000 if developed. And, while the CRMP requires Council approval to develop upland property lying within 200 feet of protected waters, the strict "compelling public purpose" test does not govern proposed land uses on property in this classification. Council officials testified at trial, moreover, that they would have allowed petitioner to build a residence on the upland parcel. Nevertheless, this Court's ripeness jurisprudence requires petitioner to explore development opportunities on his upland parcel only if there is uncertainty as to the land's permitted use. The State's assertion that the uplands' value is in doubt comes too late for the litigation before this Court. It was stated in the certiorari petition that the uplands were worth an estimated $200,000. The figure not only was uncontested but also was cited as fact in the State's brief in opposition. In this circumstance ripeness cannot be contested by saying that the value of the nonwetland parcels is unknown. See *Lucas, supra,* at 1020, and n. 9. Nor is there genuine ambiguity in the record as to the extent of permitted development on petitioner's property, either on the wetlands or the uplands. Pp. 621–624.

(c) Nor is petitioner's takings claim rendered unripe, as the State Supreme Court held, by his failure to apply for permission to develop the 74-lot subdivision that was the basis for the damages sought in his inverse condemnation suit. It is difficult to see how this concern is relevant to the inquiry at issue here. The Council informed petitioner that he could not fill the wetlands; it follows of necessity that he could not fill and then build 74 single-family dwellings there. Petitioner's submission of this proposal would not have clarified the extent of development permitted by the wetlands regulations, which is the inquiry required under the Court's ripeness decisions. Pp. 624–626.

2. Petitioner's acquisition of title after the regulations' effective date did not bar his takings claims. This Court rejects the State Supreme Court's sweeping rule that a purchaser or a successive title holder like petitioner is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking. Were the Court to accept that rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be

the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land. The State's notice justification does not take into account the effect on owners at the time of enactment, who are prejudiced as well. Should an owner attempt to challenge a new regulation, but not survive the process of ripening his or her claim (which, as this case demonstrates, will often take years), under the State's rule the right to compensation may not be asserted by an heir or successor, and so may not be asserted at all. The State's rule also would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation. The State may not by this means secure a windfall for itself. See, *e. g.*, *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S. 155, 164. The rule is, furthermore, capricious in effect. The young owner contrasted with the older owner, the owner with the resources to hold contrasted with the owner with the need to sell, would be in different positions. The Takings Clause is not so quixotic. A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken. *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825, 834, n. 2, is controlling precedent for the Court's conclusion. *Lucas*, 505 U. S., at 1029, did not overrule *Nollan*, which is based on essential Takings Clause principles. On remand the state court must address the merits of petitioner's *Penn Central* claim, which is not barred by the mere fact that his title was acquired after the effective date of the state-imposed restriction. Pp. 626–630.

3. The State Supreme Court did not err in finding that petitioner failed to establish a deprivation of all economic use, for it is undisputed that his parcel retains significant development value. Petitioner is correct that, assuming a taking is otherwise established, a State may not evade the duty to compensate on the premise that the landowner is left with a token interest. This is not the situation in this case, however. A regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property "economically idle." *Lucas*, *supra*, at 1019. Petitioner attempts to revive this part of his claim by arguing, for the first time, that the upland parcel is distinct from the wetlands portions, so he should be permitted to assert a deprivation limited to the latter. The Court will not explore the point here. Petitioner did not press the argument in the state courts, and the issue was not presented in his certiorari petition. The case comes to the Court on the premise that petitioner's entire parcel serves as the basis for his takings claim, and, so framed, the total deprivation argument fails. Pp. 630–632.

Syllabus

4. Because petitioner's claims under the *Penn Central* analysis were not examined below, the case is remanded. Pp. 616, 632.

746 A. 2d 707, affirmed in part, reversed in part, and remanded.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and THOMAS, JJ., joined, and in which STEVENS, J., joined as to Part II–A. O'CONNOR, J., *post*, p. 632, and SCALIA, J., *post*, p. 636, filed concurring opinions. STEVENS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 637. GINSBURG, J., filed a dissenting opinion, in which SOUTER and BREYER, JJ., joined, *post*, p. 645. BREYER, J., filed a dissenting opinion, *post*, p. 654.

James S. Burling argued the cause for petitioner. With him on the briefs was *Eric Grant.*

Sheldon Whitehouse, Attorney General of Rhode Island, argued the cause for respondents. With him on the brief were *Michael Rubin*, Assistant Attorney General, *Brian A. Goldman* and *Richard J. Lazarus.*

Malcolm L. Stewart argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were former *Solicitor General Waxman, Assistant Attorney General Schiffer, Deputy Solicitor General Kneedler, William B. Lazarus,* and *R. Justin Smith.**

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*Briefs of *amici curiae* urging reversal were filed for the American Farm Bureau Federation et al. by *Timothy S. Bishop, Jeffrey W. Sarles, Steffen N. Johnson, John J. Rademacher,* and *John J. Kupa;* for the California Coastal Property Owners Association by *Carter G. Phillips, Mark E. Haddad,* and *Catherine Valerio Barrad;* for Defenders of Property Rights by *Nancie G. Marzulla;* for the Institute for Justice by *William H. Mellor, Clint Bolick, Scott G. Bullock,* and *Richard A. Epstein;* for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *R. Shawn Gunnarson;* and for W. Frederick Williams III et al. by *Michael E. Malamut.*

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *Bill Lockyer,* Attorney General of California, *Richard M. Frank,* Chief Assistant Attorney General, *J. Matthew Rodriquez,* Senior Assistant Attorney General, and *Joseph Barbieri,* Deputy Attorney General, *Robert R. Rigsby,* Corporation Counsel of the District of Columbia, and by the Attorneys General for their respective jurisdictions as follows: *Bruce M. Botelho* of Alaska, *Ken Salazar* of Colorado, *Richard*

JUSTICE KENNEDY delivered the opinion of the Court.

Petitioner Anthony Palazzolo owns a waterfront parcel of land in the town of Westerly, Rhode Island. Almost all of the property is designated as coastal wetlands under Rhode Island law. After petitioner's development proposals were rejected by respondent Rhode Island Coastal Resources Management Council (Council), he sued in state court, asserting the Council's application of its wetlands regulations took the property without compensation in violation of the Takings Clause of the Fifth Amendment, binding upon the State through the Due Process Clause of the Fourteenth Amendment. Petitioner sought review in this Court, contending the Supreme Court of Rhode Island erred in rejecting his takings claim. We granted certiorari. 531 U. S. 923 (2000).

I

The town of Westerly is on an edge of the Rhode Island coastline. The town's western border is the Pawcatuck River, which at that point is the boundary between Rhode

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Blumenthal of Connecticut, *Thurbert E. Baker* of Georgia, *Earl I. Anzai* of Hawaii, *Andrew Ketterer* of Maine, *Thomas F. Reilly* of Massachusetts, *Mike McGrath* of Montana, *Frankie Sue Del Papa* of Nevada, *Phillip T. McLaughlin* of New Hampshire, *John J. Farmer, Jr.*, of New Jersey, *Eliot Spitzer* of New York, *Betty D. Montgomery* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Mark W. Barnett* of South Dakota, *William H. Sorrell* of Vermont, *Iver A. Stridiron* of the Virgin Islands, and *Christine O. Gregoire* of Washington; for the County of Santa Barbara by *Stephen Shane Stark* and *Alan L. Seltzer;* for the American Planning Association et al. by *Timothy J. Dowling* and *James E. Ryan;* for the Board of County Commissioners of the County of La Plata, Colorado, by *Michael A. Goldman* and *Jeffery P. Robbins;* for the National Conference of State Legislatures et al. by *Richard Ruda* and *James I. Crowley;* for the National Wildlife Federation et al. by *Vicki L. Been* and *Glenn P. Sugameli;* for Save the Bay-People for Narragansett Bay by *Deming E. Sherman* and *Kendra Beaver;* and for Daniel W. Bromley et al. by *John D. Echeverria.*

Briefs of *amici curiae* were filed for the National Association of Home Builders by *Christopher G. Senior;* and for Dr. John M. Teal et al. by *Patrick A. Parenteau* and *Tim Eichenberg.*

Island and Connecticut. Situated on land purchased from the Narragansett Indian Tribe, the town was incorporated in 1669 and had a precarious, though colorful, early history. Both Connecticut and Massachusetts contested the boundaries—and indeed the validity—of Rhode Island's royal charter; and Westerly's proximity to Connecticut invited encroachments during these jurisdictional squabbles. See M. Best, The Town that Saved a State—Westerly 60–83 (1943); see also W. McLoughlin, Rhode Island: A Bicentennial History 39–57 (1978). When the borders of the Rhode Island Colony were settled by compact in 1728, the town's development was more orderly, and with some historical distinction. For instance, Watch Hill Point, the peninsula at the southwestern tip of the town, was of strategic importance in the Revolutionary War and the War of 1812. See Best, *supra*, at 190; F. Denison, Westerly and its Witnesses 118–119 (1878).

In later times Westerly's coastal location had a new significance: It became a popular vacation and seaside destination. One of the town's historians gave this happy account:

> "After the Civil War the rapid growth of manufacture and expansion of trade had created a spending class on pleasure bent, and Westerly had superior attractions to offer, surf bathing on ocean beaches, quieter bathing in salt and fresh water ponds, fishing, annual sail and later motor boat races. The broad beaches of clean white sand dip gently toward the sea; there are no odorous marshes at low tide, no railroad belches smoke, and the climate is unrivalled on the coast, that of Newport only excepted. In the phenomenal heat wave of 1881 ocean resorts from northern New England to southern New Jersey sweltered as the thermometer climbed to 95 and 104 degrees, while Watch Hill enjoyed a comfortable 80. When Providence to the north runs a temperature of 90, the mercury in this favored spot remains at 77." Best, *supra*, at 192.

Westerly today has about 20,000 year-round residents, and thousands of summer visitors come to enjoy its beaches and coastal advantages.

One of the more popular attractions is Misquamicut State Beach, a lengthy expanse of coastline facing Block Island Sound and beyond to the Atlantic Ocean. The primary point of access to the beach is Atlantic Avenue, a well-traveled 3-mile stretch of road running along the coastline within the town's limits. At its western end, Atlantic Avenue is something of a commercial strip, with restaurants, hotels, arcades, and other typical seashore businesses. The pattern of development becomes more residential as the road winds eastward onto a narrow spine of land bordered to the south by the beach and the ocean, and to the north by Winnapaug Pond, an intertidal inlet often used by residents for boating, fishing, and shellfishing.

In 1959 petitioner, a lifelong Westerly resident, decided to invest in three undeveloped, adjoining parcels along this eastern stretch of Atlantic Avenue. To the north, the property faces, and borders upon, Winnapaug Pond; the south of the property faces Atlantic Avenue and the beachfront homes abutting it on the other side, and beyond that the dunes and the beach. To purchase and hold the property, petitioner and associates formed Shore Gardens, Inc. (SGI). After SGI purchased the property petitioner bought out his associates and became the sole shareholder. In the first decade of SGI's ownership of the property the corporation submitted a plat to the town subdividing the property into 80 lots; and it engaged in various transactions that left it with 74 lots, which together encompassed about 20 acres. During the same period SGI also made initial attempts to develop the property and submitted intermittent applications to state agencies to fill substantial portions of the parcel. Most of the property was then, as it is now, salt marsh subject to tidal flooding. The wet ground and permeable soil would require considerable fill—as much as six feet in some

places—before significant structures could be built. SGI's proposal, submitted in 1962 to the Rhode Island Division of Harbors and Rivers (DHR), sought to dredge from Winnapaug Pond and fill the entire property. The application was denied for lack of essential information. A second, similar proposal followed a year later. A third application, submitted in 1966 while the second application was pending, proposed more limited filling of the land for use as a private beach club. These latter two applications were referred to the Rhode Island Department of Natural Resources, which indicated initial assent. The agency later withdrew approval, however, citing adverse environmental impacts. SGI did not contest the ruling.

No further attempts to develop the property were made for over a decade. Two intervening events, however, become important to the issues presented. First, in 1971, Rhode Island enacted legislation creating the Council, an agency charged with the duty of protecting the State's coastal properties. 1971 R. I. Pub. Laws, ch. 279, § 1 *et seq.* Regulations promulgated by the Council designated salt marshes like those on SGI's property as protected "coastal wetlands," Rhode Island Coastal Resources Management Program (CRMP) § 210.3 (as amended, June 28, 1983) (lodged with the Clerk of this Court), on which development is limited to a great extent. Second, in 1978, SGI's corporate charter was revoked for failure to pay corporate income taxes; and title to the property passed, by operation of state law, to petitioner as the corporation's sole shareholder.

In 1983, petitioner, now the owner, renewed the efforts to develop the property. An application to the Council, resembling the 1962 submission, requested permission to construct a wooden bulkhead along the shore of Winnapaug Pond and to fill the entire marshland area. The Council rejected the application, noting it was "vague and inadequate for a project of this size and nature." App. 16. The agency also found that "the proposed activities will have significant im-

pacts upon the waters and wetlands of Winnapaug Pond," and concluded that "the proposed alteration . . . will conflict with the Coastal Resources Management Plan presently in effect." *Id.*, at 17. Petitioner did not appeal the agency's determination.

Petitioner went back to the drawing board, this time hiring counsel and preparing a more specific and limited proposal for use of the property. The new application, submitted to the Council in 1985, echoed the 1966 request to build a private beach club. The details do not tend to inspire the reader with an idyllic coastal image, for the proposal was to fill 11 acres of the property with gravel to accommodate "50 cars with boat trailers, a dumpster, port-a-johns, picnic tables, barbecue pits of concrete, and other trash receptacles." *Id.*, at 25.

The application fared no better with the Council than previous ones. Under the agency's regulations, a landowner wishing to fill salt marsh on Winnapaug Pond needed a "special exception" from the Council. CRMP § 130. In a short opinion the Council said the beach club proposal conflicted with the regulatory standard for a special exception. See App. 27. To secure a special exception the proposed activity must serve "a compelling public purpose which provides benefits to the public as a whole as opposed to individual or private interests." CRMP § 130A(1). This time petitioner appealed the decision to the Rhode Island courts, challenging the Council's conclusion as contrary to principles of state administrative law. The Council's decision was affirmed. See App. 31–42.

Petitioner filed an inverse condemnation action in Rhode Island Superior Court, asserting that the State's wetlands regulations, as applied by the Council to his parcel, had taken the property without compensation in violation of the Fifth and Fourteenth Amendments. See *id.*, at 45. The suit alleged the Council's action deprived him of "economically, beneficial use" of his property, *ibid.*, resulting in a total tak-

ing requiring compensation under *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003 (1992). He sought damages in the amount of $3,150,000, a figure derived from an appraiser's estimate as to the value of a 74-lot residential subdivision. The State countered with a host of defenses. After a bench trial, a justice of the Superior Court ruled against petitioner, accepting some of the State's theories. App. to Pet. for Cert. B–1 to B–13.

The Rhode Island Supreme Court affirmed. 746 A. 2d 707 (2000). Like the Superior Court, the State Supreme Court recited multiple grounds for rejecting petitioner's suit. The court held, first, that petitioner's takings claim was not ripe, *id.*, at 712–715; second, that petitioner had no right to challenge regulations predating 1978, when he succeeded to legal ownership of the property from SGI, *id.*, at 716; and third, that the claim of deprivation of all economically beneficial use was contradicted by undisputed evidence that he had $200,000 in development value remaining on an upland parcel of the property, *id.*, at 715. In addition to holding petitioner could not assert a takings claim based on the denial of all economic use, the court concluded he could not recover under the more general test of *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104 (1978). On this claim, too, the date of acquisition of the parcel was found determinative, and the court held he could have had "no reasonable investment-backed expectations that were affected by this regulation" because it predated his ownership, 746 A. 2d, at 717; see also *Penn Central*, *supra*, at 124.

We disagree with the Supreme Court of Rhode Island as to the first two of these conclusions; and, we hold, the court was correct to conclude that the owner is not deprived of all economic use of his property because the value of upland portions is substantial. We remand for further consideration of the claim under the principles set forth in *Penn Central*.

II

The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226 (1897), prohibits the government from taking private property for public use without just compensation. The clearest sort of taking occurs when the government encroaches upon or occupies private land for its own proposed use. Our cases establish that even a minimal "permanent physical occupation of real property" requires compensation under the Clause. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 427 (1982). In *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393 (1922), the Court recognized that there will be instances when government actions do not encroach upon or occupy the property yet still affect and limit its use to such an extent that a taking occurs. In Justice Holmes' well-known, if less than self-defining, formulation, "while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking." *Id.*, at 415.

Since *Mahon*, we have given some, but not too specific, guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking. First, we have observed, with certain qualifications, see *infra*, at 629–630, that a regulation which "denies all economically beneficial or productive use of land" will require compensation under the Takings Clause. *Lucas*, 505 U. S., at 1015; see also *id.*, at 1035 (KENNEDY, J., concurring); *Agins* v. *City of Tiburon*, 447 U. S. 255, 261 (1980). Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. *Penn Central*, *supra*, at 124. These inquiries are informed by the purpose of the

Takings Clause, which is to prevent the government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U. S. 40, 49 (1960).

Petitioner seeks compensation under these principles. At the outset, however, we face the two threshold considerations invoked by the state court to bar the claim: ripeness, and acquisition which postdates the regulation.

A

In *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U. S. 172 (1985), the Court explained the requirement that a takings claim must be ripe. The Court held that a takings claim challenging the application of land-use regulations is not ripe unless "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Id.*, at 186. A final decision by the responsible state agency informs the constitutional determination whether a regulation has deprived a landowner of "all economically beneficial use" of the property, see *Lucas*, *supra*, at 1015, or defeated the reasonable investment-backed expectations of the landowner to the extent that a taking has occurred, see *Penn Central*, *supra*, at 124. These matters cannot be resolved in definitive terms until a court knows "the extent of permitted development" on the land in question. *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U. S. 340, 351 (1986). Drawing on these principles, the Rhode Island Supreme Court held that petitioner had not taken the necessary steps to ripen his takings claim.

The central question in resolving the ripeness issue, under *Williamson County* and other relevant decisions, is whether petitioner obtained a final decision from the Council determining the permitted use for the land. As we have noted, SGI's early applications to fill had been granted at one point,

though that assent was later revoked. Petitioner then submitted two proposals: the 1983 proposal to fill the entire parcel, and the 1985 proposal to fill 11 of the property's 18 wetland acres for construction of the beach club. The court reasoned that, notwithstanding the Council's denials of the applications, doubt remained as to the extent of development the Council would allow on petitioner's parcel. We cannot agree.

The court based its holding in part upon petitioner's failure to explore "any other use for the property that would involve filling substantially less wetlands." 746 A. 2d, at 714. It relied upon this Court's observations that the final decision requirement is not satisfied when a developer submits, and a land-use authority denies, a grandiose development proposal, leaving open the possibility that lesser uses of the property might be permitted. See *MacDonald*, *supra*, at 353, n. 9. The suggestion is that while the Council rejected petitioner's effort to fill all of the wetlands, and then rejected his proposal to fill 11 of the wetland acres, perhaps an application to fill (for instance) 5 acres would have been approved. Thus, the reasoning goes, we cannot know for sure the extent of permitted development on petitioner's wetlands.

This is belied by the unequivocal nature of the wetland regulations at issue and by the Council's application of the regulations to the subject property. Winnapaug Pond is classified under the CRMP as a Type 2 body of water. See CRMP § 200.2. A landowner, as a general rule, is prohibited from filling or building residential structures on wetlands adjacent to Type 2 waters, see *id.*, Table 1, p. 22, and § 210.3(C)(4), but may seek a special exception from the Council to engage in a prohibited use, see *id.*, § 130. The Council is permitted to allow the exception, however, only where a "compelling public purpose" is served. *Id.*, § 130A(2). The proposal to fill the entire property was not accepted under Council regulations and did not qualify for the special exception. The Council determined the use pro-

posed in the second application (the beach club) did not satisfy the "compelling public purpose" standard. There is no indication the Council would have accepted the application had petitioner's proposed beach club occupied a smaller surface area. To the contrary, it ruled that the proposed activity was not a "compelling public purpose." App. 27; cf. *id.*, at 17 (1983 application to fill wetlands proposed an "activity" conflicting with the CRMP).

Williamson County's final decision requirement "responds to the high degree of discretion characteristically possessed by land-use boards in softening the strictures of the general regulations they administer." *Suitum* v. *Tahoe Regional Planning Agency*, 520 U. S. 725, 738 (1997). While a landowner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened. The case is quite unlike those upon which respondents place principal reliance, which arose when an owner challenged a land-use authority's denial of a substantial project, leaving doubt whether a more modest submission or an application for a variance would be accepted. See *MacDonald*, *supra*, at 342 (denial of 159-home residential subdivision); *Williamson County*, *supra*, at 182 (476-unit subdivision); cf. *Agins* v. *City of Tiburon*, 447 U. S. 255 (1980) (case not ripe because no plan to develop was submitted).

These cases stand for the important principle that a landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation. Under our ripeness rules a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development

plans for the property, including the opportunity to grant any variances or waivers allowed by law. As a general rule, until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established. See *Suitum*, *supra*, at 736, and n. 10 (noting difficulty of demonstrating that "mere enactment" of regulations restricting land use effects a taking). Government authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision. *Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U. S. 687, 698 (1999).

With respect to the wetlands on petitioner's property, the Council's decisions make plain that the agency interpreted its regulations to bar petitioner from engaging in any filling or development activity on the wetlands, a fact reinforced by the Attorney General's forthright responses to our questioning during oral argument in this case. See Tr. of Oral Arg. 26, 31. The rulings of the Council interpreting the regulations at issue, and the briefs, arguments, and candid statements by counsel for both sides, leave no doubt on this point: On the wetlands there can be no fill for any ordinary land use. There can be no fill for its own sake; no fill for a beach club, either rustic or upscale; no fill for a subdivision; no fill for any likely or foreseeable use. And with no fill there can be no structures and no development on the wetlands. Further permit applications were not necessary to establish this point.

As noted above, however, not all of petitioner's parcel constitutes protected wetlands. The trial court accepted uncontested testimony that an upland site located at the eastern end of the property would have an estimated value of $200,000 if developed. App. to Pet. for Cert. B–5. While Council approval is required to develop upland property which lies within 200 feet of protected waters, see CRMP § 100.1(A), the strict "compelling public purpose" test does not govern proposed land uses on property in this classifica-

tion, see *id.*, § 110, Table 1A, § 120. Council officials testified at trial, moreover, that they would have allowed petitioner to build a residence on the upland parcel. App. to Pet. for Cert. B–5. The State Supreme Court found petitioner's claim unripe for the further reason that he "has not sought permission for any . . . use of the property that would involve . . . development only of the upland portion of the parcel." 746 A. 2d, at 714.

In assessing the significance of petitioner's failure to submit applications to develop the upland area it is important to bear in mind the purpose that the final decision requirement serves. Our ripeness jurisprudence imposes obligations on landowners because "[a] court cannot determine whether a regulation goes 'too far' unless it knows how far the regulation goes." *MacDonald*, 477 U. S., at 348. Ripeness doctrine does not require a landowner to submit applications for their own sake. Petitioner is required to explore development opportunities on his upland parcel only if there is uncertainty as to the land's permitted use.

The State asserts the value of the uplands is in doubt. It relies in part on a comment in the opinion of the Rhode Island Supreme Court that "it would be possible to build at least one single-family home on the upland portion of the parcel." 746 A. 2d, at 714. It argues that the qualification "at least" indicates that additional development beyond the single dwelling was possible. The attempt to interject ambiguity as to the value or use of the uplands, however, comes too late in the day for purposes of litigation before this Court. It was stated in the petition for certiorari that the uplands on petitioner's property had an estimated worth of $200,000. See Pet. for Cert. 21. The figure not only was uncontested but also was cited as fact in the State's brief in opposition. See Brief in Opposition 4, 19. In this circumstance ripeness cannot be contested by saying that the value of the nonwetland parcels is unknown. See *Lucas*, 505 U. S., at 1020, and n. 9.

The State's prior willingness to accept the $200,000 figure, furthermore, is well founded. The only reference to upland property in the trial court's opinion is to a single parcel worth an estimated $200,000. See App. to Pet. for Cert. B–5. There was, it must be acknowledged, testimony at trial suggesting the existence of an additional upland parcel elsewhere on the property. See Tr. 190–191, 199–120 (testimony of Dr. Grover Fugate, Council Executive Director); see also *id.*, at 610 (testimony of Steven Clarke). The testimony indicated, however, that the potential, second upland parcel was on an "island" which required construction of a road across wetlands, *id.*, at 610, 623–624 (testimony of Mr. Clarke)—and, as discussed above, the filling of wetlands for such a purpose would not justify a special exception under Council regulations. See *supra*, at 619–621; see also Brief for Respondents 10 ("Residential construction is not the basis of such a 'special exception' "). Perhaps for this reason, the State did not maintain in the trial court that additional uplands could have been developed. To the contrary, its post-trial memorandum identified only the single parcel that petitioner concedes retains a development value of $200,000. See State's Post-Trial Memorandum in No. 88–0297 (Super. Ct. R. I.), pp. 25, 81. The trial court accepted the figure. So there is no genuine ambiguity in the record as to the extent of permitted development on petitioner's property, either on the wetlands or the uplands.

Nonetheless, there is some suggestion that the use permitted on the uplands is not known, because the State accepted the $200,000 value for the upland parcel on the premise that only a *Lucas* claim was raised in the pleadings in the state trial court. See Brief for Respondents 29–30. Since a *Penn Central* argument was not pressed at trial, it is argued, the State had no reason to assert with vigor that more than a single-family residence might be placed on the uplands. We disagree; the State was aware of the applicability of *Penn Central*. The issue whether the Council's decisions

amounted to a taking under *Penn Central* was discussed in the trial court, App. to Pet. for Cert. B–7, the State Supreme Court, 746 A. 2d, at 717, and the State's own post-trial submissions, see State's Post-Trial Supplemental Memorandum 7–10. The state-court opinions cannot be read as indicating that a *Penn Central* claim was not properly presented from the outset of this litigation.

A final ripeness issue remains. In concluding that *Williamson County*'s final decision requirement was not satisfied, the State Supreme Court placed emphasis on petitioner's failure to "appl[y] for permission to develop [the] seventy-four-lot subdivision" that was the basis for the damages sought in his inverse condemnation suit. 746 A. 2d, at 714. The court did not explain why it thought this fact significant, but respondents and *amici* defend the ruling. The Council's practice, they assert, is to consider a proposal only if the applicant has satisfied all other regulatory preconditions for the use envisioned in the application. The subdivision proposal that was the basis for petitioner's takings claim, they add, could not have proceeded before the Council without, at minimum, zoning approval from the town of Westerly and a permit from the Rhode Island Department of Environmental Management allowing the installation of individual sewage disposal systems on the property. Petitioner is accused of employing a hide the ball strategy of submitting applications for more modest uses to the Council, only to assert later a takings action predicated on the purported inability to build a much larger project. Brief for the National Wildlife Federation et al. as *Amici Curiae* 9.

It is difficult to see how this concern is relevant to the inquiry at issue here. Petitioner was informed by the Council that he could not fill the wetlands; it follows of necessity that he could not fill and then build 74 single-family dwellings upon it. Petitioner's submission of this proposal would not have clarified the extent of development permitted by the wetlands regulations, which is the inquiry required

under our ripeness decisions. The State's concern may be that landowners could demand damages for a taking based on a project that could not have been constructed under other, valid zoning restrictions quite apart from the regulation being challenged. This, of course, is a valid concern in inverse condemnation cases alleging injury from wrongful refusal to permit development. The instant case does not require us to pass upon the authority of a State to insist in such cases that landowners follow normal planning procedures or to enact rules to control damages awards based on hypothetical uses that should have been reviewed in the normal course, and we do not intend to cast doubt upon such rules here. The mere allegation of entitlement to the value of an intensive use will not avail the landowner if the project would not have been allowed under other existing, legitimate land-use limitations. When a taking has occurred, under accepted condemnation principles the owner's damages will be based upon the property's fair market value, see, *e. g.*, *Olson* v. *United States*, 292 U. S. 246, 255 (1934); 4 J. Sackman, Nichols on Eminent Domain § 12.01 (rev. 3d ed. 2000)—an inquiry which will turn, in part, on restrictions on use imposed by legitimate zoning or other regulatory limitations, see *id.*, § 12C.03[1].

The state court, however, did not rely upon state-law ripeness or exhaustion principles in holding that petitioner's takings claim was barred by virtue of his failure to apply for a 74-lot subdivision; it relied on *Williamson County*. As we have explained, *Williamson County* and our other ripeness decisions do not impose further obligations on petitioner, for the limitations the wetland regulations imposed were clear from the Council's denial of his applications, and there is no indication that any use involving any substantial structures or improvements would have been allowed. Where the state agency charged with enforcing a challenged land-use regulation entertains an application from an owner and its denial of the application makes clear the extent of develop-

ment permitted, and neither the agency nor a reviewing state court has cited noncompliance with reasonable state-law exhaustion or pre-permit processes, see *Felder* v. *Casey*, 487 U. S. 131, 150–151 (1988), federal ripeness rules do not require the submission of further and futile applications with other agencies.

B

We turn to the second asserted basis for declining to address petitioner's takings claim on the merits. When the Council promulgated its wetlands regulations, the disputed parcel was owned not by petitioner but by the corporation of which he was sole shareholder. When title was transferred to petitioner by operation of law, the wetlands regulations were in force. The state court held the postregulation acquisition of title was fatal to the claim for deprivation of all economic use, 746 A. 2d, at 716, and to the *Penn Central* claim, 746 A. 2d, at 717. While the first holding was couched in terms of background principles of state property law, see *Lucas*, 505 U. S., at 1015, and the second in terms of petitioner's reasonable investment-backed expectations, see *Penn Central*, 438 U. S., at 124, the two holdings together amount to a single, sweeping, rule: A purchaser or a successive title holder like petitioner is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking.

The theory underlying the argument that postenactment purchasers cannot challenge a regulation under the Takings Clause seems to run on these lines: Property rights are created by the State. See, *e. g.*, *Phillips* v. *Washington Legal Foundation*, 524 U. S. 156, 163 (1998). So, the argument goes, by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation.

The State may not put so potent a Hobbesian stick into the Lockean bundle. The right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions. See *Pennsylvania Coal Co.*, 260 U. S., at 413 ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law"). The Takings Clause, however, in certain circumstances allows a landowner to assert that a particular exercise of the State's regulatory power is so unreasonable or onerous as to compel compensation. Just as a prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned, other enactments are unreasonable and do not become less so through passage of time or title. Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.

Nor does the justification of notice take into account the effect on owners at the time of enactment, who are prejudiced as well. Should an owner attempt to challenge a new regulation, but not survive the process of ripening his or her claim (which, as this case demonstrates, will often take years), under the proposed rule the right to compensation may not be asserted by an heir or successor, and so may not be asserted at all. The State's rule would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation. The State may not by this means secure a windfall for itself. See *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S.

155, 164 (1980) ("[A] State, by *ipse dixit*, may not transform private property into public property without compensation"); cf. Ellickson, Property in Land, 102 Yale L. J. 1315, 1368–1369 (1993) (right to transfer interest in land is a defining characteristic of the fee simple estate). The proposed rule is, furthermore, capricious in effect. The young owner contrasted with the older owner, the owner with the resources to hold contrasted with the owner with the need to sell, would be in different positions. The Takings Clause is not so quixotic. A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken.

Direct condemnation, by invocation of the State's power of eminent domain, presents different considerations from cases alleging a taking based on a burdensome regulation. In a direct condemnation action, or when a State has physically invaded the property without filing suit, the fact and extent of the taking are known. In such an instance, it is a general rule of the law of eminent domain that any award goes to the owner at the time of the taking, and that the right to compensation is not passed to a subsequent purchaser. See *Danforth* v. *United States*, 308 U. S. 271, 284 (1939); 2 Sackman, Eminent Domain, at § 5.01[5][d][i] ("It is well settled that when there is a taking of property by eminent domain in compliance with the law, it is the owner of the property *at the time of the taking* who is entitled to compensation"). A challenge to the application of a land-use regulation, by contrast, does not mature until ripeness requirements have been satisfied, under principles we have discussed; until this point an inverse condemnation claim alleging a regulatory taking cannot be maintained. It would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner.

There is controlling precedent for our conclusion. *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825 (1987), presented the question whether it was consistent with the Takings Clause for a state regulatory agency to require oceanfront landowners to provide lateral beach access to the public as the condition for a development permit. The principal dissenting opinion observed it was a policy of the California Coastal Commission to require the condition, and that the Nollans, who purchased their home after the policy went into effect, were "on notice that new developments would be approved only if provisions were made for lateral beach access." *Id.*, at 860 (Brennan, J., dissenting). A majority of the Court rejected the proposition. "So long as the Commission could not have deprived the prior owners of the easement without compensating them," the Court reasoned, "the prior owners must be understood to have transferred their full property rights in conveying the lot." *Id.*, at 834, n. 2.

It is argued that *Nollan*'s holding was limited by the later decision in *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003 (1992). In *Lucas* the Court observed that a landowner's ability to recover for a government deprivation of all economically beneficial use of property is not absolute but instead is confined by limitations on the use of land which "inhere in the title itself." *Id.*, at 1029. This is so, the Court reasoned, because the landowner is constrained by those "restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Ibid.* It is asserted here that *Lucas* stands for the proposition that any new regulation, once enacted, becomes a background principle of property law which cannot be challenged by those who acquire title after the enactment.

We have no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law or whether those circumstances are present here. It suffices to say that a regulation that other-

wise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title. This relative standard would be incompatible with our description of the concept in *Lucas*, which is explained in terms of those common, shared understandings of permissible limitations derived from a State's legal tradition, see *id.*, at 1029–1030. A regulation or common-law rule cannot be a background principle for some owners but not for others. The determination whether an existing, general law can limit all economic use of property must turn on objective factors, such as the nature of the land use proscribed. See *id.*, at 1030 ("The 'total taking' inquiry we require today will ordinarily entail . . . analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities"). A law does not become a background principle for subsequent owners by enactment itself. *Lucas* did not overrule our holding in *Nollan*, which, as we have noted, is based on essential Takings Clause principles.

For reasons we discuss next, the state court will not find it necessary to explore these matters on remand in connection with the claim that all economic use was deprived; it must address, however, the merits of petitioner's claim under *Penn Central*. That claim is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction.

III

As the case is ripe, and as the date of transfer of title does not bar petitioner's takings claim, we have before us the alternative ground relied upon by the Rhode Island Supreme Court in ruling upon the merits of the takings claims. It held that all economically beneficial use was not deprived because the uplands portion of the property can still be improved. On this point, we agree with the court's decision. Petitioner accepts the Council's contention and the state trial

court's finding that his parcel retains $200,000 in development value under the State's wetlands regulations. He asserts, nonetheless, that he has suffered a total taking and contends the Council cannot sidestep the holding in *Lucas* "by the simple expedient of leaving a landowner a few crumbs of value." Brief for Petitioner 37.

Assuming a taking is otherwise established, a State may not evade the duty to compensate on the premise that the landowner is left with a token interest. This is not the situation of the landowner in this case, however. A regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property "economically idle." *Lucas, supra,* at 1019.

In his brief submitted to us petitioner attempts to revive this part of his claim by reframing it. He argues, for the first time, that the upland parcel is distinct from the wetlands portions, so he should be permitted to assert a deprivation limited to the latter. This contention asks us to examine the difficult, persisting question of what is the proper denominator in the takings fraction. See Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation Law," 80 Harv. L. Rev. 1165, 1192 (1967). Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole, see, *e. g., Keystone Bituminous Coal Assn.* v. *DeBenedictis,* 480 U. S. 470, 497 (1987); but we have at times expressed discomfort with the logic of this rule, see *Lucas, supra,* at 1016–1017, n. 7, a sentiment echoed by some commentators, see, *e. g.,* Epstein, Takings: Descent and Resurrection, 1987 S. Ct. Rev. 1, 16–17 (1987); Fee, Unearthing the Denominator in Regulatory Takings Claims, 61 U. Chi. L. Rev. 1535 (1994). Whatever the merits of these criticisms, we will not explore the point here. Petitioner did not press the argument in the state courts, and the issue was not presented in the petition for certiorari. The case comes to us on the premise that petitioner's entire

parcel serves as the basis for his takings claim, and, so framed, the total deprivation argument fails.

* * *

For the reasons we have discussed, the State Supreme Court erred in finding petitioner's claims were unripe and in ruling that acquisition of title after the effective date of the regulations barred the takings claims. The court did not err in finding that petitioner failed to establish a deprivation of all economic value, for it is undisputed that the parcel retains significant worth for construction of a residence. The claims under the *Penn Central* analysis were not examined, and for this purpose the case should be remanded.

The judgment of the Rhode Island Supreme Court is affirmed in part and reversed in part, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, concurring.

I join the opinion of the Court but with my understanding of how the issues discussed in Part II–B of the opinion must be considered on remand.

Part II–B of the Court's opinion addresses the circumstance, present in this case, where a takings claimant has acquired title to the regulated property after the enactment of the regulation at issue. As the Court holds, the Rhode Island Supreme Court erred in effectively adopting the sweeping rule that the preacquisition enactment of the use restriction *ipso facto* defeats any takings claim based on that use restriction. Accordingly, the Court holds that petitioner's claim under *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104 (1978), "is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction." *Ante*, at 630.

The more difficult question is what role the temporal relationship between regulatory enactment and title acquisition

plays in a proper *Penn Central* analysis. Today's holding does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial to the *Penn Central* analysis. Indeed, it would be just as much error to expunge this consideration from the takings inquiry as it would be to accord it exclusive significance. Our polestar instead remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings. Under these cases, interference with investment-backed expectations is one of a number of factors that a court must examine. Further, the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations.

The Fifth Amendment forbids the taking of private property for public use without just compensation. We have recognized that this constitutional guarantee is "'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Penn Central*, *supra*, at 123–124 (quoting *Armstrong* v. *United States*, 364 U. S. 40, 49 (1960)). The concepts of "fairness and justice" that underlie the Takings Clause, of course, are less than fully determinate. Accordingly, we have eschewed "any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Penn Central*, *supra*, at 124 (quoting *Goldblatt* v. *Hempstead*, 369 U. S. 590, 594 (1962)). The outcome instead "depends largely 'upon the particular circumstances [in that] case.'" *Penn Central*, *supra*, at 124 (quoting *United States* v. *Central Eureka Mining Co.*, 357 U. S. 155, 168 (1958)).

We have "identified several factors that have particular significance" in these "essentially ad hoc, factual inquiries." *Penn Central*, 438 U. S., at 124. Two such factors are "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered

with distinct investment-backed expectations." *Ibid.* Another is "the character of the governmental action." *Ibid.* The purposes served, as well as the effects produced, by a particular regulation inform the takings analysis. *Id.*, at 127 ("[A] use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose, [citations omitted], or perhaps if it has an unduly harsh impact upon the owner's use of the property"); see also *Yee* v. *Escondido*, 503 U. S. 519, 523 (1992) (Regulatory takings cases "necessarily entai[l] complex factual assessments of the purposes and economic effects of government actions"). *Penn Central* does not supply mathematically precise variables, but instead provides important guideposts that lead to the ultimate determination whether just compensation is required.

The Rhode Island Supreme Court concluded that, because the wetlands regulations predated petitioner's acquisition of the property at issue, petitioner lacked reasonable investment-backed expectations and hence lacked a viable takings claim. 746 A. 2d 707, 717 (2000). The court erred in elevating what it believed to be "[petitioner's] lack of reasonable investment-backed expectations" to "dispositive" status. *Ibid.* Investment-backed expectations, though important, are not talismanic under *Penn Central.* Evaluation of the degree of interference with investment-backed expectations instead is *one* factor that points toward the answer to the question whether the application of a particular regulation to particular property "goes too far." *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415 (1922).

Further, the state of regulatory affairs at the time of acquisition is not the only factor that may determine the extent of investment-backed expectations. For example, the nature and extent of permitted development under the regulatory regime vis-à-vis the development sought by the claimant may also shape legitimate expectations without vesting any kind of development right in the property owner. We

also have never held that a takings claim is defeated simply on account of the lack of a personal financial investment by a postenactment acquirer of property, such as a donee, heir, or devisee. Cf. *Hodel* v. *Irving*, 481 U. S. 704, 714–718 (1987). Courts instead must attend to those circumstances which are probative of what fairness requires in a given case.

If investment-backed expectations are given exclusive significance in the *Penn Central* analysis and existing regulations dictate the reasonableness of those expectations in every instance, then the State wields far too much power to redefine property rights upon passage of title. On the other hand, if existing regulations do nothing to inform the analysis, then some property owners may reap windfalls and an important indicium of fairness is lost.* As I understand it, our decision today does not remove the regulatory backdrop against which an owner takes title to property from the purview of the *Penn Central* inquiry. It simply restores balance to that inquiry. Courts properly consider the effect of existing regulations under the rubric of investment-backed expectations in determining whether a compensable taking

*JUSTICE SCALIA's inapt "government-as-thief" simile is symptomatic of the larger failing of his opinion, which is that he appears to conflate two questions. The first question is whether the enactment or application of a regulation constitutes a valid exercise of the police power. The second question is whether the State must compensate a property owner for a diminution in value effected by the State's exercise of its police power. We have held that "[t]he 'public use' requirement [of the Takings Clause] is . . . coterminous with the scope of a sovereign's police powers." *Hawaii Housing Authority* v. *Midkiff*, 467 U. S. 229, 240 (1984). The relative timing of regulatory enactment and title acquisition, of course, does not affect the analysis of whether a State has acted within the scope of these powers in the first place. That issue appears to be the one on which JUSTICE SCALIA focuses, but it is not the matter at hand. The relevant question instead is the second question described above. It is to this inquiry that "investment-backed expectations" and the state of regulatory affairs upon acquisition of title are relevant under *Penn Central*. JUSTICE SCALIA's approach therefore would seem to require a revision of the *Penn Central* analysis that this Court has not undertaken.

has occurred. As before, the salience of these facts cannot be reduced to any "set formula." *Penn Central*, 438 U. S., at 124 (internal quotation marks omitted). The temptation to adopt what amount to *per se* rules in either direction must be resisted. The Takings Clause requires careful examination and weighing of all the relevant circumstances in this context. The court below therefore must consider on remand the array of relevant factors under *Penn Central* before deciding whether any compensation is due.

JUSTICE SCALIA, concurring.

I write separately to make clear that my understanding of how the issues discussed in Part II–B of the Court's opinion must be considered on remand is not JUSTICE O'CONNOR's.

The principle that underlies her separate concurrence is that it may in some (unspecified) circumstances be "[un]-fai[r]," and produce unacceptable "windfalls," to allow a subsequent purchaser to nullify an unconstitutional partial taking (though, inexplicably, not an unconstitutional total taking) by the government. *Ante*, at 635. The polar horrible, presumably, is the situation in which a sharp real estate developer, realizing (or indeed, simply gambling on) the unconstitutional excessiveness of a development restriction that a naïve landowner assumes to be valid, purchases property at what it would be worth subject to the restriction, and then develops it to its full value (or resells it at its full value) after getting the unconstitutional restriction invalidated.

This can, I suppose, be called a windfall—though it is not much different from the windfalls that occur every day at stock exchanges or antique auctions, where the knowledgeable (or the venturesome) profit at the expense of the ignorant (or the risk averse). There is something to be said (though in my view not much) for pursuing abstract "fairness" by requiring part or all of that windfall to be returned to the naïve original owner, who presumably is the "rightful" owner of it. But there is nothing to be said for giving

it instead to the *government*—which not only did not lose something it owned, but is both the *cause* of the miscarriage of "fairness" and the only one of the three parties involved in the miscarriage (government, naïve original owner, and sharp real estate developer) which *acted unlawfully*—indeed *unconstitutionally.* JUSTICE O'CONNOR would eliminate the windfall by giving the malefactor the benefit of its malefaction. It is rather like eliminating the windfall that accrued to a purchaser who bought property at a bargain rate from a thief clothed with the indicia of title, by making him turn over the "unjust" profit *to the thief.**

In my view, the fact that a restriction existed at the time the purchaser took title (other than a restriction forming part of the "background principles of the State's law of property and nuisance," *Lucas* v. *South Carolina Coastal Council,* 505 U. S. 1003, 1029 (1992)) should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking. The "investment-backed expectations" that the law will take into account do not include the assumed validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional. Which is to say that a *Penn Central* taking, see *Penn Central Transp. Co.* v. *New York City,* 438 U. S. 104 (1978), no less than a total taking, is not absolved by the transfer of title.

JUSTICE STEVENS, concurring in part and dissenting in part.

In an admirable effort to frame its inquiries in broadly significant terms, the majority offers five pages of commentary on the issue of whether an owner of property can chal-

*Contrary to JUSTICE O'CONNOR's assertion, *ante,* at 635, n., my contention of governmental wrongdoing does not assume that the government exceeded its police powers by ignoring the "public use" requirement of the Takings Clause, see *Hawaii Housing Authority* v. *Midkiff,* 467 U. S. 229, 240 (1984). It is wrong for the government to take property, *even* for public use, without tendering just compensation.

lenge regulations adopted prior to her acquisition of that property without ever discussing the particular facts or legal claims at issue in this case. See *ante*, at 626–630. While I agree with some of what the Court has to say on this issue, an examination of the issue in the context of the facts of this case convinces me that the Court has oversimplified a complex calculus and conflated two separate questions. Therefore, while I join Part II–A of the opinion, I dissent from the judgment and, in particular, from Part II–B.

I

Though States and local governments have broad power to adopt regulations limiting land usage, those powers are constrained by the Constitution and by other provisions of state law. In adopting land-use restrictions, local authorities must follow legally valid and constitutionally sufficient procedures and must adhere to whatever substantive requirements are imposed by the Constitution and supervening law. If a regulating body fails to adhere to its procedural or substantive obligations in developing land-use restrictions, anyone adversely impacted by the restrictions may challenge their validity in an injunctive action. If the application of such restriction to a property owner would cause her a "direct and substantial injury," *e. g.*, *Chicago* v. *Atchison, T. & S. F. R. Co.*, 357 U. S. 77, 83 (1958), I have no doubt that she has standing to challenge the restriction's validity whether she acquired title to the property before or after the regulation was adopted. For, as the Court correctly observes, even future generations "have a right to challenge unreasonable limitations on the use and value of land." *Ante*, at 627.

It by no means follows, however, that, as the Court assumes, a succeeding owner may obtain compensation for a taking of property from her predecessor in interest. A taking is a discrete event, a governmental acquisition of private property for which the State is required to provide just compensation. Like other transfers of property, it occurs at a

particular time, that time being the moment when the relevant property interest is alienated from its owner.[1]

Precise specification of the moment a taking occurred and of the nature of the property interest taken is necessary in order to determine an appropriately compensatory remedy. For example, the amount of the award is measured by the value of the property at the time of taking, not the value at some later date. Similarly, interest on the award runs from that date. Most importantly for our purposes today, it is the person who owned the property at the time of the taking that is entitled to the recovery. See, *e. g.*, *Danforth* v. *United States*, 308 U. S. 271, 284 (1939) ("For the reason that compensation is due at the time of taking, the owner at that time, not the owner at an earlier or later date, receives the payment"). The rationale behind that rule is true whether the transfer of ownership is the result of an arm's-length negotiation, an inheritance, or the dissolution of a bankrupt debtor. Cf. *United States* v. *Dow*, 357 U. S. 17, 20–21 (1958).[2]

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[1] A regulation that goes so "far" that it violates the Takings Clause may give rise to an award of compensation or it may simply be invalidated as it would be if it violated any other constitutional principle (with the consequence that the State must choose between adopting a new regulatory scheme that provides compensation or forgoing regulation). While some recent Court opinions have focused on the former remedy, Justice Holmes appears to have had a regime focusing on the latter in mind in the opinion that began the modern preoccupation with "regulatory takings." See *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 414 (1922) (because the statute in question takes private property without just compensation "the act cannot be sustained").

[2] The Court argues, *ante*, at 628, that a regulatory taking is different from a direct state appropriation of property and that the rules this Court has developed for identifying the time of the latter do not apply to the former. This is something of an odd conclusion, in that the entire rationale for allowing compensation for regulations in the first place is the somewhat dubious proposition that some regulations go so "far" as to become the functional equivalent of a direct taking. Ultimately, the Court's regulations-are-different principle rests on the confusion of two dates: the time an injury occurs and the time a claim for compensation for that injury becomes cognizable in a judicial proceeding. That we require plaintiffs making the claim that a regulation is the equivalent of a taking to go

II

Much of the difficulty of this case stems from genuine confusion as to when the taking Palazzolo alleges actually occurred. According to Palazzolo's theory of the case, the owners of his Westerly, Rhode Island, property possessed the right to fill the wetland portion of the property at some point in the not-too-distant past.[3] In 1971, the State of Rhode Island passed a statute creating the Rhode Island Coastal Resources Management Council (Council) and delegating the Council the authority to promulgate regulations restricting the usage of coastal land. See 1971 R. I. Pub.

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through certain prelitigation procedures to clarify the scope of the allegedly infringing regulation does not mean that the injury did not occur before those procedures were completed. To the contrary, whenever the relevant local bodies construe their regulations, their construction is assumed to reflect "what the [regulation] meant before as well as after the decision giving rise to that construction." *Rivers* v. *Roadway Express, Inc.*, 511 U. S. 298, 312–313 (1994).

[3] This point is the subject of significant dispute, as the State of Rhode Island has presented substantial evidence that limitations on coastal development have always precluded or limited schemes such as Palazzolo's. See Brief for Respondents 11–12, 41–46. Nonetheless, we must assume that it is true for the purposes of deciding this question.

Likewise, we must assume for the purposes of deciding the discrete threshold questions before us that petitioner's complaint states a potentially valid regulatory takings claim. Nonetheless, for the sake of clarity it is worth emphasizing that, on my view, even a newly adopted regulation that diminishes the value of property does not produce a significant Takings Clause issue if it (1) is generally applicable and (2) is directed at preventing a substantial public harm. Cf. *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1029 (1992) (owner of a powerplant astride an earthquake fault does not state a valid takings claim for regulation requiring closure of plant); *id.*, at 1035 (KENNEDY, J., concurring in judgment) (explaining that the government's power to regulate against harmful uses of property without paying compensation is not limited by the common law of nuisance because that doctrine is "too narrow a confine for the exercise of regulatory power in a complex and interdependent society"). It is quite likely that a regulation prohibiting the filling of wetlands meets those criteria.

Laws, ch. 279, § 1 *et seq.* The Council promptly adopted regulations that, *inter alia*, effectively foreclosed petitioner from filling his wetlands. See *ante*, at 614; cf. App. to Brief for Respondents 11–22 (current version of regulations). As the regulations nonetheless provided for a process through which petitioner might seek permission to fill the wetlands, he filed two applications for such permission during the 1980's, both of which were denied. See *ante*, at 614–615.

The most natural reading of petitioner's complaint is that the regulations in and of themselves precluded him from filling the wetlands, and that their adoption therefore constituted the alleged taking. This reading is consistent with the Court's analysis in Part II–A of its opinion (which I join) in which the Court explains that petitioner's takings claims are ripe for decision because respondents' wetlands regulations unequivocally provide that there can be "no fill for any likely or foreseeable use." *Ante*, at 621.[4] If it is the regulations themselves of which petitioner complains, and if they did, in fact, diminish the value of his property, they did so when they were adopted.

To the extent that the adoption of the regulations constitute the challenged taking, petitioner is simply the wrong party to be bringing this action. If the regulations imposed a compensable injury on anyone, it was on the owner of the property at the moment the regulations were adopted. Given the trial court's finding that petitioner did not own the property at that time,[5] in my judgment it is pellucidly clear

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[4] At oral argument, petitioner's counsel stated: "I think the key here is understanding that no filling of any wetland would be allowed for any reason that was lawful under the local zoning code. No structures of any kind would be permitted by Mr. Palazzolo to construct. So we know that he cannot use his wetland." Tr. of Oral Arg. 14.

[5] See App. to Pet. for Cert. A–13 ("[T]he trial justice found that Palazzolo could not have become the owner of the property before 1978, at which time the regulations limiting his ability to fill the wetlands were already in place. The trial justice thus determined that the right to fill the wetlands was not part of Palazzolo's estate to begin with, and that he

that he has no standing to claim that the promulgation of the regulations constituted a taking of any part of the property that he subsequently acquired.

His lack of standing does not depend, as the Court seems to assume, on whether or not petitioner "is deemed to have notice of an earlier-enacted restriction," *ante*, at 626. If those early regulations changed the character of the owner's title to the property, thereby diminishing its value, petitioner acquired only the net value that remained after that diminishment occurred. Of course, if, as respondents contend, see n. 3, *supra*, even the prior owner never had any right to fill wetlands, there never was a basis for the alleged takings claim in the first place. But accepting petitioner's theory of the case, he has no standing to complain that preacquisition events may have reduced the value of the property that he acquired. If the regulations are invalid, either because improper procedures were followed when they were adopted, or because they have somehow gone "too far," *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415 (1922), petitioner may seek to enjoin their enforcement, but he has no right to recover compensation for the value of property taken from someone else. A new owner may maintain an ejectment action against a trespasser who has lodged himself in the owner's orchard but surely could not recover damages for fruit a trespasser spirited from the orchard before he acquired the property.

The Court's holding in *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825 (1987), is fully consistent with this analysis. In that case the taking occurred when the state agency compelled the petitioners to provide an easement of public access to the beach as a condition for a development permit. That event—a compelled transfer of an interest in property—occurred *after* the petitioners had become the owner of the property and unquestionably diminished the

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was therefore not owed any compensation for the deprivation of that right").

value of petitioners' property. Even though they had notice when they bought the property that such a taking might occur, they never contended that any action taken by the State before their purchase gave rise to any right to compensation. The matter of standing to assert a claim for just compensation is determined by the impact of the event that is alleged to have amounted to a taking rather than the sort of notice that a purchaser may or may not have received when the property was transferred. Petitioners in *Nollan* owned the property at the time of the triggering event. Therefore, they and they alone could claim a right to compensation for the injury.[6] Their successors in interest, like petitioner in this case, have no standing to bring such a claim.

III

At oral argument, petitioner contended that the taking in question occurred in 1986, when the Council denied his final application to fill the land. Tr. of Oral Arg. 16. Though this theory, to the extent that it was embraced within petitioner's actual complaint, complicates the issue, it does not alter my conclusion that the prohibition on filling the wetlands does not take from Palazzolo any property right he ever possessed.

The title Palazzolo took by operation of law in 1978 was limited by the regulations then in place to the extent that such regulations represented a valid exercise of the police power. For the reasons expressed above, I think the regulations barred petitioner from filling the wetlands on his property. At the very least, however, they established a rule that such lands could not be filled unless the Council

[6] In cases such as *Nollan*—in which landowners have notice of a regulation when they purchase a piece of property but the regulatory event constituting the taking does not occur until after they take title to the property—I would treat the owners' notice as relevant to the evaluation of whether the regulation goes "too far," but not necessarily dispositive. See *ante*, at 632–636 (O'CONNOR, J., concurring).

exercised its authority to make exceptions to that rule under certain circumstances. Cf. App. to Brief for Respondents A–13 (laying out narrow circumstances under which the Council retains the discretion to grant a "special exception"). Under the reading of the regulations most favorable to Palazzolo, he acquired no more than the right to a discretionary determination by the Council as to whether to permit him to fill the wetlands. As his two hearings before that body attest, he was given the opportunity to make a presentation and receive such a determination. Thus, the Council properly respected whatever limited rights he may have retained with regard to filling the wetlands. Cf. *Lujan* v. *G & G Fire Sprinklers, Inc.*, 532 U. S. 189 (2001) (holding, in a different context, that, if a party's only relevant property interest is a claim of entitlement to bring an action, the provision of a forum for hearing that action is all that is required to vindicate that property interest); *Lopez* v. *Davis*, 531 U. S. 230 (2001) (involving a federal statute that created an entitlement to a discretionary hearing without creating any entitlement to relief).[7]

Though the majority leaves open the possibility that the scope of today's holding may prove limited, see *ante*, at 629–630 (discussing limitations implicit in "background principles" exception); see also *ante*, at 632–636 (O'CONNOR, J., concurring) (discussing importance of the timing of regula-

[7] This is not to suggest that a regulatory body can insulate all of its land-use decisions from the Takings Clause simply by referencing long-standing statutory provisions. If the determination by the regulators to reject the project involves such an unforseeable interpretation or extension of the regulation as to amount to a change in the law, then it is appropriate to consider the decision of that body, rather than the adoption of the regulation, as the discrete event that deprived the owner of a pre-existing interest in property. But, if that is petitioner's theory, his claim is not ripe for the reasons stated by JUSTICE GINSBURG in her dissenting opinion, *post*, p. 645. As I read petitioner's complaint and the Court's disposition of the ripeness issue, it is the regulations themselves that allegedly deprived the owner of the parcel of the right to fill the wetlands.

tions for the evaluation of the merits of a takings claim); *post*, at 654–655 (BREYER, J., dissenting) (same), the extension of the right to compensation to individuals other than the direct victim of an illegal taking admits of no obvious limiting principle. If the existence of valid land-use regulations does not limit the title that the first postenactment purchaser of the property inherits, then there is no reason why such regulations should limit the rights of the second, the third, or the thirtieth purchaser. Perhaps my concern is unwarranted, but today's decision does raise the spectre of a tremendous—and tremendously capricious—one-time transfer of wealth from society at large to those individuals who happen to hold title to large tracts of land at the moment this legal question is permanently resolved.

IV

In the final analysis, the property interest at stake in this litigation is the right to fill the wetlands on the tract that petitioner owns. Whether either he or his predecessors in title ever owned such an interest, and if so, when it was acquired by the State, are questions of state law. If it is clear—as I think it is and as I think the Court's disposition of the ripeness issue assumes—that any such taking occurred before he became the owner of the property, he has no standing to seek compensation for that taking. On the other hand, if the only viable takings claim has a different predicate that arose later, that claim is not ripe and the discussion in Part II–B of the Court's opinion is superfluous dictum. In either event, the judgment of the Rhode Island Supreme Court should be affirmed in its entirety.

JUSTICE GINSBURG, with whom JUSTICE SOUTER and JUSTICE BREYER join, dissenting.

A regulatory takings claim is not ripe for adjudication, this Court has held, until the agency administering the regulations at issue, proceeding in good faith, "has arrived at a final, definitive position regarding how it will apply [those

regulations] to the particular land in question." *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U. S. 172, 191 (1985). Absent such a final decision, a court cannot "kno[w] the nature and extent of permitted development" under the regulations, and therefore cannot say "how far the regulation[s] g[o]," as regulatory takings law requires. *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U. S. 340, 348, 351 (1986). Therefore, even when a landowner seeks and is denied permission to develop property, if the denial does not demonstrate the effective impact of the regulations on the land, the denial does not represent the "final decision" requisite to generate a ripe dispute. *Williamson County*, 473 U. S., at 190.

MacDonald illustrates how a highly ambitious application may not ripen a takings claim. The landowner in that case proposed a 159-home subdivision. 477 U. S., at 342. When that large proposal was denied, the owner complained that the State had appropriated "all beneficial use of its property." *Id.*, at 352, n. 8; see also *id.*, at 344. This Court concluded, however, that the landowner's claim was not ripe, for the denial of the massive development left "open the possibility that some development [would] be permitted." *Id.*, at 352. "Rejection of exceedingly grandiose development plans," the Court observed, "does not logically imply that less ambitious plans will receive similarly unfavorable reviews." *Id.*, at 353, n. 9.

As presented to the Rhode Island Supreme Court, Anthony Palazzolo's case was a close analogue to *MacDonald*. Palazzolo's land has two components. Approximately 18 acres are wetlands that sustain a rich but delicate ecosystem. See 746 A. 2d 707, 710, and n. 1 (R. I. 2000). Additional acres are less environmentally sensitive "uplands." (The number of upland acres remains in doubt, see *ibid.*, because Palazzolo has never submitted "an accurate or detailed survey" of his property, see Tr. 190 (June 18–19, 1997).) Rhode Island's administrative agency with ultimate permitting au-

thority over the wetlands, the Coastal Resources Management Council (CRMC), bars residential development of the wetlands, but not the uplands.

Although Palazzolo submitted several applications to develop his property, those applications uniformly sought permission to fill most or all of the wetlands portion of the property. None aimed to develop only the uplands.[1] Upon denial of the last of Palazzolo's applications, Palazzolo filed suit claiming that Rhode Island had taken his property by refusing "to allow any development." App. 45 (Complaint ¶ 17).

As the Rhode Island Supreme Court saw the case, Palazzolo's claim was not ripe for several reasons, among them, that Palazzolo had not sought permission for "development only of the upland portion of the parcel." 746 A. 2d, at 714. The Rhode Island court emphasized the "undisputed evidence in the record that it would be possible to build at least one single-family home on the existing upland area, with no need for additional fill." *Ibid.*

Today, the Court rejects the Rhode Island court's determination that the case is unripe, finding no "uncertainty as to

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[1] Moreover, none proposed the 74-lot subdivision Palazzolo advances as the basis for the compensation he seeks. Palazzolo's first application sought to fill all 18 acres of wetlands for no stated purpose whatever. See App. 11 (Palazzolo's sworn 1983 answer to the question why he sought to fill uplands) ("Because it's my right to do if I want to to look at it it is my business."). Palazzolo's second application proposed a most disagreeable "beach club." See *ante*, at 615 ("trash bins" and "port-a-johns" sought); Tr. 650 (June 25–26, 1997) (testimony of engineer Steven M. Clarke) (to get to the club's water, *i. e.*, Winnapaug Pond rather than the nearby Atlantic Ocean, "you'd have to walk across the gravel fill, but then work your way through approximately 70, 75 feet of marsh land or conservation grasses"). Neither of the CRMC applications supplied a clear map of the proposed development. See App. 7, 16 (1983 application); Tr. 190 (June 18–19, 1997) (1985 application). The Rhode Island Supreme Court ultimately concluded that the 74-lot development would have been barred by zoning requirements, apart from CRMC regulations, requirements Palazzolo never explored. See 746 A. 2d 707, 715, n. 7 (2000).

the [uplands'] permitted use." *Ante*, at 622. The Court's conclusion is, in my view, both inaccurate and inequitable. It is inaccurate because the record is ambiguous. And it is inequitable because, given the claim asserted by Palazzolo in the Rhode Island courts, the State had no cause to pursue further inquiry into potential upland development. But Palazzolo presses other claims here, and at his behest, the Court not only entertains them, but also turns the State's legitimate defense against the claim Palazzolo originally stated into a weapon against the State. I would reject Palazzolo's bait-and-switch ploy and affirm the judgment of the Rhode Island Supreme Court.

* * *

Where physical occupation of land is not at issue, the Court's cases identify two basic forms of regulatory taking. *Ante*, at 617. In *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003 (1992), the Court held that, subject to "certain qualifications," *ante*, at 617, 629, denial of "*all* economically beneficial or productive use of land" constitutes a taking. 505 U. S., at 1015 (emphasis added). However, if a regulation does not leave the property "economically idle," *id.*, at 1019, to establish the alleged taking the landowner may pursue the multifactor inquiry set out in *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104, 123–125 (1978).

Like the landowner in *MacDonald*, Palazzolo sought federal constitutional relief *only* under a straightforward application of *Lucas*. See *ante*, at 615–616; App. 45 (Complaint ¶ 17) ("As a direct and proximate result of the Defendants' refusal to allow *any* development of the property, there has been a taking" (emphasis added)); Plaintiff's Post Trial Memorandum in No. 88–0297 (Super. Ct., R. I.), p. 6 ("[T]his Court need not look beyond the *Lucas* case as its very lucid and precise standards will determine whether a taking has occurred."); *id.*, at 9–10 ("[T]here is *NO USE* for the property whatsoever. . . . Not one scintilla of evidence was proffered

by the State to prove, intimate or even suggest a theoretical possibility of *any* use for this property—never mind a beneficial use. Not once did the State claim that there *is*, in fact, some use available for the Palazzolo parcel."); Brief of Appellant in No. 98–0333, pp. 5, 7, 9–10 (hereinafter Brief of Appellant) (restating, verbatim, assertions of Post Trial Memorandum quoted above).

Responding to Palazzolo's *Lucas* claim, the State urged as a sufficient defense this now uncontested point: CRMC "would [have been] happy to have [Palazzolo] situate a home" on the uplands, "thus allowing [him] to realize 200,000 dollars." State's Post-Trial Memorandum in No. 88–0297 (Super. Ct., R. I.), p. 81; see also Brief of Appellees in No. 98–0333A, p. 25 (hereinafter Brief of Appellees) (Palazzolo "never even applied for the realistic alternative of using the entire parcel as a single unitary home-site"). The State did present some evidence at trial that more than one lot could be developed. See *infra*, at 653–654. And, in a supplemental post-trial memorandum addressing a then new Rhode Island Supreme Court decision, the State briefly urged that Palazzolo's claims would fail even under *Penn Central*. See *ante*, at 624. The evidence of additional uses and the post-trial argument directed to *Penn Central*, however, were underdeveloped and unnecessary, for Palazzolo himself, in his pleadings and at trial, pressed only a *Lucas*-based claim that he had been denied *all* economically viable use of his property. Once the State demonstrated that an "economically beneficial" development was genuinely plausible, *Lucas*, 505 U. S., at 1015, the State had established the analogy to *MacDonald:* The record now showed "valuable use might still be made of the land." 477 U. S., at 352, n. 8; see Brief of Appellees 24–25 (relying on *MacDonald*). The prospect of real development shown by the State warranted a ripeness dismissal of Palazzolo's complaint.

Addressing the State's *Lucas* defense in *Lucas* terms, Palazzolo insisted that his land had "no use . . . as a result of

CRMC's application of its regulations." Brief of Appellant 11. The Rhode Island Supreme Court rejected Palazzolo's argument, identifying in the record evidence that Palazzolo could build at least one home on the uplands. 746 A. 2d, at 714. The court therefore concluded that Palazzolo's failure to seek permission for "development only of the upland portion of the parcel" meant that Palazzolo could not "maintain a claim that the CRMC ha[d] deprived him of all beneficial use of the property." *Ibid.*

It is true that the Rhode Island courts, in the course of ruling for the State, briefly touched base with *Penn Central.* Cf. *ante,* at 624. The critical point, however, underplayed by the Court, is that Palazzolo never raised or argued the *Penn Central* issue in the state system: not in his complaint; not in his trial court submissions; not—even after the trial court touched on the *Penn Central* issue—in his briefing on appeal. The state high court decision, raising and quickly disposing of the matter, unquestionably permits us to consider the *Penn Central* issue. See *Raley* v. *Ohio,* 360 U. S. 423, 436–437 (1959). But the ruling below does not change the reality essential here: Palazzolo litigated his takings claim, and it was incumbent on the State to defend against that claim, only under *Lucas.*

If Palazzolo's arguments in this Court had tracked his arguments in the state courts, his petition for certiorari would have argued simply that the Rhode Island courts got it wrong in failing to see that his land had "no use" at all because of CRMC's rules. Brief of Appellant 11. This Court likely would not have granted certiorari to review the application of *MacDonald* and *Lucas* to the facts of Palazzolo's case. However, aided by new counsel, Palazzolo sought—and in the exercise of this Court's discretion obtained—review of two contentions he did not advance below. The first assertion is that the state regulations take the property under *Penn Central.* See Pet. for Cert. 20; Brief for Petitioner 47–50. The second argument is that the regulations

amount to a taking under an expanded rendition of *Lucas* covering cases in which a landowner is left with property retaining only a "few crumbs of value." *Ante*, at 631 (quoting Brief for Petitioner 37); Pet. for Cert. 20–22. Again, it bears repetition, Palazzolo never claimed in the courts below that, if the State were correct that his land could be used for a residence, a taking nonetheless occurred.[2]

In support of his new claims, Palazzolo has conceded the very point on which the State properly relied to resist the simple *Lucas* claim presented below: that Palazzolo can obtain approval for one house of substantial economic value. Palazzolo does not merely accept the argument that the State advanced below. He now contends that the evidence proffered by the State in the Rhode Island courts supports the claims he presents here, by demonstrating that *only* one house would be approved. See Brief for Petitioner 13 ("[T]he uncontradicted evidence was that CRMC . . . would not deny [Palazzolo] permission to build one single-family home on the small upland portion of his property." (emphasis deleted)); Pet. for Cert. 15 (the extent of development permitted on the land is "perfectly clear: one single-family home and nothing more").

As a logical matter, Palazzolo's argument does not stand up. The State's submissions in the Rhode Island courts hardly establish that Palazzolo could obtain approval for *only* one house of value. By showing that Palazzolo could have obtained approval for a $200,000 house (rather than, say, two houses worth $400,000), the State's submissions established only a floor, not a ceiling, on the value of permissi-

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[2] After this Court granted certiorari, in his briefing on the merits, Palazzolo presented still another takings theory. That theory, in tension with numerous holdings of this Court, see, *e. g.*, *Concrete Pipe & Products of Cal., Inc.* v. *Construction Laborers Pension Trust for Southern Cal.*, 508 U. S. 602, 643–644 (1993), was predicated on treatment of his wetlands as a property separate from the uplands. The Court properly declines to reach this claim. *Ante*, at 631.

ble development. For a floor value was all the State needed to defeat Palazzolo's simple *Lucas* claim.

Furthermore, Palazzolo's argument is unfair: The argument transforms the State's legitimate defense to the only claim Palazzolo stated below into offensive support for other claims he states for the first time here. Casting away fairness (and fairness to a State, no less), the Court indulges Palazzolo's bait-and-switch maneuver. The Court concludes that "there is no genuine ambiguity in the record as to the extent of permitted development on . . . the uplands." *Ante,* at 623. Two theories are offered to support this conclusion.

First, the Court asserts, it is "too late in the day" for the State to contend the uplands give the property more than $200,000 in value; Palazzolo "stated" in his petition for certiorari that the property has "an estimated worth of $200,000," and the State cited that contention "as fact" in its Brief in Opposition. *Ante,* at 622. But in the cited pages of its Brief in Opposition, the State simply said it "would" approve a "single home" worth $200,000. Brief in Opposition 4, 19. That statement does not foreclose the possibility that the State would *also* approve another home, adding further value to the property.

To be sure, the Brief in Opposition did overlook Palazzolo's change in his theory of the case, a change that, had it been asserted earlier, could have rendered insufficient the evidence the State intelligently emphasized below. But the State's failure to appreciate that Palazzolo had moved the pea to a different shell hardly merits the Court's waiver finding. The only precedent cited for the waiver, a footnote in *Lucas,* is not remotely on point. *Ante,* at 622. The landowner in *Lucas* had invoked a "finding" of fact by the state court, and this Court deemed the State's challenge to that finding waived because the challenge was not timely raised. 505 U. S., at 1020–1022, n. 9. There is nothing extraordinary about this Court's deciding a case on the findings made by a

state court. Here, however, the "fact" this Court has stopped the State from contesting—that the property has value of *only* $200,000—was never found by any court. That valuation was simply asserted, inaccurately, see *infra* this page and 654, in Palazzolo's petition for certiorari. This Court's waiver ruling thus amounts to an unsavory invitation to unscrupulous litigants: Change your theory and misrepresent the record in your petition for certiorari; if the respondent fails to note your machinations, you have created a different record on which this Court will review the case.

The Court bolsters its waiver finding by asserting that the $200,000 figure is "well founded" in the record. *Ante*, at 623. But, as earlier observed, an absence of multiple valuation possibilities in the record cannot be held against the State, for proof of more than the $200,000 development was unnecessary to defend against the *Lucas* claim singularly pleaded below. And in any event, the record does not warrant the Court's conclusion.

The Court acknowledges "testimony at trial suggesting the existence of an additional upland parcel elsewhere on the property" on which a second house might be built. *Ante*, at 623. The Court discounts that prospect, however, on the ground that development of the additional parcel would require a new road forbidden under CRMC's regulations. *Ibid.* Yet the one witness on whose testimony the Court relies, Steven M. Clarke, himself concluded that it *would* be "realistic to apply for" development at more than one location. Tr. 612 (June 25–26, 1997). Clarke added that a state official, Russell Chateauneuf, "gave [Clarke] supporting information saying that [multiple applications] made sense." *Ibid.* The conclusions of Clarke and Chateauneuf are confirmed by the testimony of CRMC's executive director, Grover Fugate, who agreed with Palazzolo's counsel during cross-examination that Palazzolo might be able to build "on two, perhaps three, perhaps four of the lots." *Id.*, at 211 (June 20–23, 1997); see also Tr. of Oral Arg. 27 ("[T]here

is . . . uncertainty as to what additional upland there is and how many other houses can be built.").

The ambiguities in the record thus are substantial. They persist in part because their resolution was not required to address the claim Palazzolo presented below, and in part because Palazzolo failed ever to submit an accurate survey of his property. Under the circumstances, I would not step into the role of supreme topographical factfinder to resolve ambiguities in Palazzolo's favor. Instead, I would look to, and rely on, the opinion of the state court whose decision we now review. That opinion states: "There was undisputed evidence in the record that it would be possible to build *at least* one single-family home on the existing upland area." 746 A. 2d, at 714 (emphasis added). This Court cites nothing to warrant amendment of that finding.[3]

* * *

In sum, as I see this case, we still do not know "the nature and extent of permitted development" under the regulation in question, *MacDonald*, 477 U. S., at 351. I would therefore affirm the Rhode Island Supreme Court's judgment.

JUSTICE BREYER, dissenting.

I agree with JUSTICE GINSBURG that Palazzolo's takings claim is not ripe for adjudication, and I join her opinion in full. Ordinarily I would go no further. But because the Court holds the takings claim to be ripe and goes on to address some important issues of substantive takings law, I add that, given this Court's precedents, I would agree with JUSTICE O'CONNOR that the simple fact that a piece of property has changed hands (for example, by inheritance) does not

[3] If Palazzolo's claim were ripe and the merits properly presented, I would, at a minimum, agree with JUSTICE O'CONNOR, *post*, at 632–636 (concurring opinion), JUSTICE STEVENS, *ante*, at 643 (opinion concurring in part and dissenting in part), and JUSTICE BREYER, *post* this page and 655 (dissenting opinion), that transfer of title can impair a takings claim.

always and *automatically* bar a takings claim. Here, for example, without in any way suggesting that Palazzolo has any valid takings claim, I believe his postregulatory acquisition of the property (through automatic operation of law) by itself should not prove dispositive.

As JUSTICE O'CONNOR explains, under *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104 (1978), much depends upon whether, or how, the timing and circumstances of a change of ownership affect whatever reasonable investment-backed expectations might otherwise exist. Ordinarily, such expectations will diminish in force and significance—rapidly and dramatically—as property continues to change hands over time. I believe that such factors can adequately be taken into account within the *Penn Central* framework.

Several *amici* have warned that to allow complete regulatory takings claims, see *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003 (1992), to survive changes in land ownership could allow property owners to manufacture such claims by strategically transferring property until only a nonusable portion remains. See, *e. g.*, Brief for Daniel W. Bromley et al. as *Amici Curiae* 7–8. But I do not see how a constitutional provision concerned with "'fairness and justice,'" *Penn Central*, *supra*, at 123–124 (quoting *Armstrong* v. *United States*, 364 U. S. 40, 49 (1960)), could reward any such strategic behavior.

Syllabus

TYLER *v.* CAIN, WARDEN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 00–5961. Argued April 16, 2001—Decided June 28, 2001

After petitioner Tyler was convicted of second-degree murder and his conviction was affirmed on appeal, he filed five Louisiana state-court petitions for postconviction relief and a federal habeas petition, all of which were denied. After this Court decided *Cage* v. *Louisiana*, 498 U. S. 39—under which a jury instruction is unconstitutional if there is a reasonable likelihood that the jury understood it to allow conviction without proof beyond a reasonable doubt—Tyler filed a sixth state petition, claiming that a jury instruction in his trial was substantively identical to the one condemned in *Cage*. The State District Court denied relief, and the State Supreme Court affirmed. Seeking to pursue his *Cage* claim in federal court, Tyler moved the Fifth Circuit for permission to file a second habeas application, as required by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The court granted the motion. The District Court then proceeded to the merits of Tyler's claim and denied relief. Although the Fifth Circuit affirmed, it stated that the District Court had erred by failing first to determine whether Tyler had satisfied AEDPA's successive habeas standard, which requires a district court to dismiss a claim in a second or successive application unless, as relevant here, the applicant "shows" that the "claim relies on a new rule of constitutional law, *made retroactive to cases on collateral review by the Supreme Court*, that was previously unavailable." 28 U. S. C. § 2244(b)(2)(A) (emphasis added). Relying on Circuit precedent, the court concluded that Tyler did not meet this standard.

Held: The *Cage* rule was not "made retroactive to cases on collateral review by the Supreme Court," within the meaning of § 2244(b)(2)(A). Pp. 661–668.

(a) Based on § 2244(b)(2)(A)'s plain meaning when read as a whole, "made" means "held." Under the statute, this Court is the only entity that can "ma[k]e" a new rule retroactive. The new rule becomes retroactive, not by the decisions of the lower court or by the combined action of the Supreme Court and the lower courts, but simply by the action of the Supreme Court. The only way the Supreme Court can, by itself, lay out and construct a rule's retroactive effect is through a holding. This Court does not "ma[k]e" a rule retroactive when it merely estab-

lishes principles of retroactivity and leaves their application to lower courts. In such an event, the lower court (or perhaps a combination of courts), not the Supreme Court, develops any legal conclusion derived from those principles. Although the statute uses the word "made," not "held," Congress is permitted to use synonyms in a statute, see *Williams* v. *Taylor*, 529 U. S. 362, and "made" and "held" are synonyms in the § 2244(b)(2)(A) context. This interpretation is necessary for the proper implementation of AEDPA's collateral review structure. The stringent 30-day time period that § 2244(b)(3)(D) imposes on courts of appeals determining whether an application "makes a prima facie showing that [it] satisfies the [second habeas standard]," § 2244(b)(3)(C), suggests that those courts do not have to engage in the difficult legal analysis that can be required to determine questions of retroactivity in the first instance, but need only rely on Supreme Court retroactivity holdings. Pp. 662–664.

(b) The *Cage* rule has not been "made retroactive . . . by the Supreme Court." *Cage* did not make itself retroactive, and neither did *Sullivan* v. *Louisiana*, 508 U. S. 275, 279. Tyler contends that *Sullivan*'s reasoning makes it clear that retroactive application of *Cage* is warranted by the principles of *Teague* v. *Lane*, 489 U. S. 288, 311–313, in which the Court held that a new rule can be retroactive to cases on collateral review only if it falls within one of two narrow exceptions to the general rule of nonretroactivity. However, the most Tyler can claim is that, based on *Teague*'s principles, this Court *should* make *Cage* retroactive to cases on collateral review. It is clear, however, that the Court has not done so. Although the Court can make a rule retroactive over the course of two cases, it has not done so here. Pp. 664–667.

(c) This Court declines to make *Cage* retroactive today. Because Tyler's habeas application was his second, the District Court was required to dismiss it unless Tyler showed that this Court already had made *Cage* retroactive. This Court cannot decide today whether *Cage* is retroactive to cases on collateral review, because that decision will not help Tyler in this case. Any statement on *Cage*'s retroactivity would be dictum, so this Court declines to comment further on the issue. Pp. 667–668.

218 F. 3d 744, affirmed.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and KENNEDY, JJ., joined. O'CONNOR, J., filed a concurring opinion, *post*, p. 668. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined, *post*, p. 670.

Herbert V. Larson, Jr., argued the cause for petitioner. With him on the briefs was *Scott L. Nelson.*

Charles E. F. Heuer argued the cause for respondent. With him on the brief were *Harry F. Connick* and *Val M. Solino.*

James A. Feldman argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Acting Solicitor General Underwood, Acting Assistant Attorney General Keeney, Deputy Solicitor General Dreeben,* and *Nina Goodman.**

JUSTICE THOMAS delivered the opinion of the Court.

Under *Cage* v. *Louisiana*, 498 U. S. 39 (1990) *(per curiam)*, a jury instruction is unconstitutional if there is a reasonable likelihood that the jury understood the instruction to allow conviction without proof beyond a reasonable doubt.[1] In

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*Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *Bill Lockyer,* Attorney General of California, *David P. Druliner,* Chief Assistant Attorney General, *Carol Wendelin Pollack,* Senior Assistant Attorney General, and *Donald E. de Nicola* and *James William Bilderback II,* Deputy Attorneys General, and by the Attorneys General for their respective States as follows: *Bill Pryor* of Alabama, *Bruce M. Botelho* of Alaska, *Ken Salazar* of Colorado, *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *James E. Ryan* of Illinois, *Thomas J. Miller* of Iowa, *Carla J. Stovall* of Kansas, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Patricia A. Madrid* of New Mexico, *Eliot Spitzer* of New York, *Wayne Stenehjem* of North Dakota, *Betty D. Montgomery* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *D. Michael Fisher* of Pennsylvania, *Charles M. Condon* of South Carolina, *Mark Barnett* of South Dakota, *Paul G. Summers* of Tennessee, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, and *Mark L. Early* of Virginia; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger.*

[1] In *Cage*, this Court observed that a reasonable juror "could have" interpreted the instruction at issue to permit a finding of guilt without the requisite proof. 498 U. S., at 41. In *Estelle* v. *McGuire*, 502 U. S. 62, 72,

this case, we must decide whether this rule was "made retroactive to cases on collateral review by the Supreme Court." 28 U. S. C. § 2244(b)(2)(A) (1994 ed., Supp. V). We hold that it was not.

I

During a fight with his estranged girlfriend in March 1975, petitioner Melvin Tyler shot and killed their 20-day-old daughter. A jury found Tyler guilty of second-degree murder, and his conviction was affirmed on appeal. After sentencing, Tyler assiduously sought postconviction relief. By 1986, he had filed five state petitions, all of which were denied. See *State ex rel. Tyler* v. *Blackburn*, 494 So. 2d 1171 (La. 1986); *State* v. *Tyler*, 446 So. 2d 1226 (La. 1984); *State ex rel. Tyler* v. *State*, 437 So. 2d 1142 (La. 1983); *State* v. *Tyler*, 430 So. 2d 92 (La. 1983); *State ex rel. Tyler* v. *Maggio*, 428 So. 2d 483 (La. 1982). He next filed a federal habeas petition, which was unsuccessful as well. *Tyler* v. *Butler*, No. 88cv4929 (ED La.), aff'd, *Tyler* v. *Whitley*, 920 F. 2d 929 (CA5 1990). After this Court's decision in *Cage*, Tyler continued his efforts. Because the jury instruction defining reasonable doubt at Tyler's trial was substantively identical to the instruction condemned in *Cage*, Tyler filed a sixth state postconviction petition, this time raising a *Cage* claim. The State District Court denied relief, and the Louisiana Supreme Court affirmed. *State ex rel. Tyler* v. *Cain*, 684 So. 2d 950 (1996).

In early 1997, Tyler returned to federal court. Seeking to pursue his *Cage* claim, Tyler moved the United States

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and n. 4 (1991), however, this Court made clear that the proper inquiry is not whether the instruction "could have" been applied unconstitutionally, but whether there is a reasonable likelihood that the jury *did* so apply it. See also *Victor* v. *Nebraska*, 511 U. S. 1, 6 (1994) ("The constitutional question in the present cases . . . is whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the [constitutional] standard").

Court of Appeals for the Fifth Circuit for permission to file a second habeas corpus application, as required by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214.[2] The Court of Appeals recognized that it could not grant the motion unless Tyler made "a prima facie showing," § 2244(b)(3)(C), that his "claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," § 2244(b)(2)(A). Finding that Tyler had made the requisite prima facie showing, the Court of Appeals granted the motion, thereby allowing Tyler to file a habeas petition in District Court.

The District Court proceeded to the merits of Tyler's claim and held that, although *Cage* should apply retroactively, App. 5–7 (citing *Humphrey* v. *Cain*, 138 F. 3d 552 (CA5 1998) (en banc)), Tyler was not entitled to collateral relief. Under AEDPA, a state prisoner can prevail only if the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." § 2254(d)(1). Concluding that Tyler could not overcome this barrier, the District Court denied his petition.

The Court of Appeals affirmed. Judgt. order reported at 218 F. 3d 744 (CA5 2000). It stated, however, that the District Court erred by failing first to determine whether Tyler "satisfied AEDPA's successive habeas standard." App. 15. AEDPA requires a district court to dismiss a claim in a second or successive application unless, as relevant here, the applicant "shows" that the "claim relies on a new rule of constitutional law, *made retroactive to cases on collateral review by the Supreme Court*, that was previously unavail-

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[2] AEDPA requires that, "[b]efore a second or successive application . . . is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U. S. C. § 2244(b)(3)(A) (1994 ed., Supp. V).

able,"[3] § 2244(b)(2)(A) (emphasis added); § 2244(b)(4). Relying on Circuit precedent, see *Brown* v. *Lensing*, 171 F. 3d 1031 (CA5 1999); *In re Smith*, 142 F. 3d 832 (CA5 1998), the Court of Appeals concluded that Tyler did not meet this standard because he "could not show that any Supreme Court decision renders the *Cage* decision retroactively applicable to cases on collateral review." App. 15.

The Courts of Appeals are divided on the question whether *Cage* was "made retroactive to cases on collateral review by the Supreme Court," as required by 28 U. S. C. § 2244(b)(2)(A). Compare *Rodriguez* v. *Superintendent*, 139 F. 3d 270 (CA1 1998) (holding that *Cage* has not been made retroactive by the Supreme Court); *Brown*, *supra* (same); *In re Hill*, 113 F. 3d 181 (CA11 1997) (same), with *West* v. *Vaughn*, 204 F. 3d 53 (CA3 2000) (holding that *Cage* has been made retroactive to cases on collateral review). To resolve this conflict, we granted certiorari. 531 U. S. 1051 (2000).

II

AEDPA greatly restricts the power of federal courts to award relief to state prisoners who file second or successive habeas corpus applications. If the prisoner asserts a claim that he has already presented in a previous federal habeas petition, the claim must be dismissed in all cases. § 2244(b)(1). And if the prisoner asserts a claim that was *not* presented in a previous petition, the claim must be dismissed unless it falls within one of two narrow exceptions. One of these exceptions is for claims predicated on newly

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[3] This requirement differs from the one that applicants must satisfy in order to obtain permission from a court of appeals to file a second or successive petition. As noted above, a court of appeals may authorize such a filing only if it determines that the applicant makes a "prima facie showing" that the application satisfies the statutory standard. § 2244(b)(3)(C). But to survive dismissal in district court, the applicant must actually "sho[w]" that the claim satisfies the standard.

discovered facts that call into question the accuracy of a guilty verdict. § 2244(b)(2)(B). The other is for certain claims relying on new rules of constitutional law. § 2244(b)(2)(A).

It is the latter exception that concerns us today. Specifically, § 2244(b)(2)(A) covers claims that "rel[y] on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." This provision establishes three prerequisites to obtaining relief in a second or successive petition: First, the rule on which the claim relies must be a "new rule" of constitutional law; second, the rule must have been "made retroactive to cases on collateral review by the Supreme Court"; and third, the claim must have been "previously unavailable." In this case, the parties ask us to interpret only the second requirement; respondent does not dispute that *Cage* created a "new rule" that was "previously unavailable." Based on the plain meaning of the text read as a whole, we conclude that "made" means "held" and, thus, the requirement is satisfied only if this Court has held that the new rule is retroactively applicable to cases on collateral review.

A

As commonly defined, "made" has several alternative meanings, none of which is entirely free from ambiguity. See, *e. g.*, Webster's Ninth New Collegiate Dictionary 718–719 (1991) (defining "to make" as "to cause to happen," "to cause to exist, occur or appear," "to lay out and construct," and "to cause to act in a certain way"). Out of context, it may thus be unclear which meaning should apply in § 2244(b)(2)(A), and how the term should be understood. We do not, however, construe the meaning of statutory terms in a vacuum. Rather, we interpret the words "in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 809 (1989). In § 2244(b)(2)(A), the word "made" falls within a clause that reads as follows: "[A] new rule of consti-

tutional law, made retroactive to cases on collateral review *by the Supreme Court.*" (Emphasis added.) Quite significantly, under this provision, the Supreme Court is the only entity that can "ma[k]e" a new rule retroactive. The new rule becomes retroactive, not by the decisions of the lower court or by the combined action of the Supreme Court and the lower courts, but simply by the action of the Supreme Court.

The only way the Supreme Court can, by itself, "lay out and construct" a rule's retroactive effect, or "cause" that effect "to exist, occur, or appear," is through a holding. The Supreme Court does not "ma[k]e" a rule retroactive when it merely establishes principles of retroactivity and leaves the application of those principles to lower courts. In such an event, any legal conclusion that is derived from the principles is developed by the lower court (or perhaps by a combination of courts), not by the Supreme Court.[4] We thus conclude that a new rule is not "made retroactive to cases on collateral review" unless the Supreme Court holds it to be retroactive.[5]

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[4] Similarly, the Supreme Court does not make a rule retroactive through dictum, which is not binding. Cf. *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 67 (1996) (contrasting dictum with holdings, which include the final disposition of a case as well as the preceding determinations "*necessary* to that result" (emphasis added)).

[5] Tyler argues that defining "made" to mean "held" would create an anomaly: When it is obvious that a rule should be retroactive, the courts of appeals will not be in conflict, and this Court will never decide to hear the case and will never make the rule retroactive. Thus, Tyler concludes, we should construe §2244(b)(2)(A) to allow for retroactive application whenever the "principles" of our decisions, as interpreted by the courts of appeals, indicate that retroactivity is appropriate. This argument is flawed, however. First, even if we disagreed with the legislative decision to establish stringent procedural requirements for retroactive application of new rules, we do not have license to question the decision on policy grounds. See *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249, 253–254 (1992). Second, the "anomalous" result that Tyler predicts is speculative at best, because AEDPA does not limit our discretion to grant certiorari to cases in which the courts of appeals have reached divergent results.

To be sure, the statute uses the word "made," not "held." But we have already stated, in a decision interpreting another provision of AEDPA, that Congress need not use the word "held" to require as much. In *Williams* v. *Taylor*, 529 U. S. 362 (2000), we concluded that the phrase "clearly established Federal law, as *determined* by the Supreme Court of the United States," § 2254(d)(1) (emphasis added), "refers to the holdings, as opposed to the dicta, of this Court's decisions," *id.*, at 412. The provision did not use the word "held," but the effect was the same. Congress, needless to say, is permitted to use synonyms in a statute. And just as "determined" and "held" are synonyms in the context of § 2254(d)(1), "made" and "held" are synonyms in the context of § 2244(b)(2)(A).

We further note that our interpretation is necessary for the proper implementation of the collateral review structure created by AEDPA. Under the statute, before a state prisoner may file a second or successive habeas application, he "shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." § 2244(b)(3)(A). The court of appeals must make a decision on the application within 30 days. § 2244(b)(3)(D). In this limited time, the court of appeals must determine whether the application "makes a prima facie showing that [it] satisfies the [second habeas standard]." § 2244(b)(3)(C). It is unlikely that a court of appeals could make such a determination in the allotted time if it had to do more than simply rely on Supreme Court holdings on retroactivity. The stringent time limit thus suggests that the courts of appeals do not have to engage in the difficult legal analysis that can be required to determine questions of retroactivity in the first instance.

B

Because "made" means "held" for purposes of § 2244(b)(2)(A), it is clear that the *Cage* rule has not been "made retroactive to cases on collateral review by the Supreme Court." *Cage* itself does not hold that it is retroac-

tive. The only holding in *Cage* is that the particular jury instruction violated the Due Process Clause.

Tyler argues, however, that a subsequent case, *Sullivan* v. *Louisiana*, 508 U. S. 275 (1993), made the *Cage* rule retroactive. But *Sullivan* held only that a *Cage* error is structural—*i. e.*, it is not amenable to harmless-error analysis and "will always invalidate the conviction." 508 U. S., at 279. Conceding that the holding in *Sullivan* does not render *Cage* retroactive to cases on collateral review, Tyler contends that the reasoning in *Sullivan* makes clear that retroactive application is warranted by the principles of *Teague* v. *Lane*, 489 U. S. 288 (1989). Under *Teague*, a new rule can be retroactive to cases on collateral review if, and only if, it falls within one of two narrow exceptions to the general rule of nonretroactivity. *Id.*, at 311–313 (plurality opinion). See also *O'Dell* v. *Netherland*, 521 U. S. 151, 156–157 (1997). The exception relevant here is for "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Graham* v. *Collins*, 506 U. S. 461, 478 (1993). To fall within this exception, a new rule must meet two requirements: Infringement of the rule must "seriously diminish the likelihood of obtaining an accurate conviction," and the rule must "'"alter our understanding of the *bedrock procedural elements*" ' essential to the fairness of a proceeding." *Sawyer* v. *Smith*, 497 U. S. 227, 242 (1990) (quoting *Teague*, *supra*, at 311 (plurality opinion), in turn quoting *Mackey* v. *United States*, 401 U. S. 667, 693 (1971) (Harlan, J., concurring in judgments in part and dissenting in part)).

According to Tyler, the reasoning of *Sullivan* demonstrates that the *Cage* rule satisfies both prongs of this *Teague* exception. First, Tyler notes, *Sullivan* repeatedly emphasized that a *Cage* error fundamentally undermines the reliability of a trial's outcome. And second, Tyler contends, the central point of *Sullivan* is that a *Cage* error deprives a defendant of a bedrock element of procedural fairness: the right to have the jury make the determination of guilt beyond a reasonable doubt. Tyler's arguments fail to persuade, how-

ever. The most he can claim is that, based on the principles outlined in *Teague*, this Court *should* make *Cage* retroactive to cases on collateral review. What is clear, however, is that we have not "made" *Cage* retroactive to cases on collateral review.[6]

JUSTICE BREYER observes that this Court can make a rule retroactive over the course of two cases. See *post*, at 672–673 (dissenting opinion). We do not disagree that, with the right combination of holdings, the Court could do this. But even so, the Court has not made *Cage* retroactive. Multiple cases can render a new rule retroactive only if the holdings in those cases necessarily dictate retroactivity of the new rule. The only holding in *Sullivan* is that a *Cage* error is structural error. There is no second case that held that all structural-error rules apply retroactively or that all structural-error rules fit within the second *Teague* exception. The standard for determining whether an error is structural, see generally *Arizona* v. *Fulminante*, 499 U. S. 279 (1991), is not coextensive with the second *Teague* exception,[7] and a

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[6] We also reject Tyler's attempt to find support in our disposition in *Adams* v. *Evatt*, 511 U. S. 1001 (1994). In *Adams*, we vacated an opinion of the Court of Appeals for the Fourth Circuit, which had held that *Cage* was not retroactive, and remanded for further consideration in light of *Sullivan*. Our order, however, was not a "final determination on the merits." *Henry* v. *Rock Hill*, 376 U. S. 776, 777 (1964) *(per curiam)*. It simply indicated that, in light of "intervening developments," there was a "reasonable probability" that the Court of Appeals would reject a legal premise on which it relied and which may affect the outcome of the litigation. *Lawrence* v. *Chater*, 516 U. S. 163, 167 (1996) *(per curiam)*.

[7] As explained above, the second *Teague* exception is available only if the new rule "'"*alter[s] our understanding* of the bedrock procedural elements" ' essential to the fairness of a proceeding." *Sawyer* v. *Smith*, 497 U. S. 227, 242 (1990) (quoting *Teague* v. *Lane*, 489 U. S. 288, 311 (1989) (plurality opinion), in turn quoting *Mackey* v. *United States*, 401 U. S. 667, 693 (1971) (Harlan, J., concurring in judgments in part and dissenting in part) (emphasis added)). Classifying an error as structural does not necessarily alter our understanding of these bedrock procedural elements. Nor can it be said that all new rules relating to due process (or even

holding that a particular error is structural does not logically dictate the conclusion that the second *Teague* exception has been met.

III

Finally, Tyler suggests that, if *Cage* has not been made retroactive to cases on collateral review, we should make it retroactive today. We disagree. Because Tyler's habeas application was his second, the District Court was required to dismiss it unless Tyler showed that this Court already had made *Cage* retroactive. § 2244(b)(4) ("A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section"); § 2244(b)(2)(A) ("A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless . . . the applicant shows that

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the "fundamental requirements of due process," see *post*, at 674 (dissenting opinion)) alter such understanding. See, *e. g.*, *Sawyer*, *supra*, at 244 (holding that the rule in *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985), did not fit within the second *Teague* exception even though it "added to an existing guarantee of due process protection against fundamental unfairness"); *O'Dell* v. *Netherland*, 521 U. S. 151, 167 (1997) (holding that the rule in *Simmons* v. *South Carolina*, 512 U. S. 154 (1994), which has been described as serving "one of the hallmarks of due process," *id.*, at 175 (O'CONNOR, J., concurring in judgment), did not fit within the second *Teague* exception). On the contrary, the second *Teague* exception is reserved only for truly "watershed" rules. See *O'Dell*, *supra*, at 167; see also *Caspari* v. *Bohlen*, 510 U. S. 383, 396 (1994) (describing such rules as "groundbreaking"); *Graham* v. *Collins*, 506 U. S. 461, 478 (1993) (explaining that the exception is limited to "a small core of rules," which not only seriously enhance accuracy but also "requir[e] 'observance of those procedures that . . . are implicit in the concept of ordered liberty' ") (quoting *Teague*, *supra*, at 311 (internal quotation marks omitted)); *Saffle* v. *Parks*, 494 U. S. 484, 495 (1990) (focusing on "primacy and centrality" of the rule). As we have recognized, it is unlikely that any of these watershed rules "ha[s] yet to emerge." *Sawyer*, *supra*, at 243 (quoting *Teague*, *supra*, at 313 (plurality opinion)); see also *Graham*, *supra*, at 478.

the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable"). We cannot decide today whether *Cage* is retroactive to cases on collateral review, because that decision would not help Tyler in this case. Any statement on *Cage*'s retroactivity would be dictum, so we decline to comment further on the issue.

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The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE O'CONNOR, concurring.

I join the Court's opinion and write separately to explain more fully the circumstances in which a new rule is "made retroactive to cases on collateral review by the Supreme Court." 28 U. S. C. § 2244(b)(2)(A) (1994 ed., Supp. V).

It is only through the holdings of this Court, as opposed to this Court's dicta and as opposed to the decisions of any other court, that a new rule is "made retroactive . . . by the Supreme Court" within the meaning of § 2244(b)(2)(A). See *ante*, at 663; cf. *Williams* v. *Taylor*, 529 U. S. 362, 412 (2000). The clearest instance, of course, in which we can be said to have "made" a new rule retroactive is where we expressly have held the new rule to be retroactive in a case on collateral review and applied the rule to that case. But, as the Court recognizes, a single case that expressly holds a rule to be retroactive is not a *sine qua non* for the satisfaction of this statutory provision. *Ante*, at 666. This Court instead may "ma[k]e" a new rule retroactive through multiple holdings that logically dictate the retroactivity of the new rule. *Ibid.* To apply the syllogistic relationship described by JUSTICE BREYER, *post*, at 672–673 (dissenting opinion), if we hold in Case One that a particular type of rule applies retroactively to cases on collateral review and hold in Case Two

that a given rule is of that particular type, then it necessarily follows that the given rule applies retroactively to cases on collateral review. In such circumstances, we can be said to have "made" the given rule retroactive to cases on collateral review.

The relationship between the conclusion that a new rule is retroactive and the holdings that "ma[k]e" this rule retroactive, however, must be strictly logical—*i. e.*, the holdings must *dictate* the conclusion and not merely provide principles from which one *may* conclude that the rule applies retroactively. As the Court observes, "[t]he Supreme Court does not 'ma[k]e' a rule retroactive when it merely establishes principles of retroactivity and leaves the application of those principles to lower courts." *Ante*, at 663. The Court instead can be said to have "made" a rule retroactive within the meaning of § 2244(b)(2)(A) only where the Court's holdings logically permit no other conclusion than that the rule is retroactive.

It is relatively easy to demonstrate the required logical relationship with respect to the first exception articulated in *Teague* v. *Lane*, 489 U. S. 288 (1989). Under this exception, "a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" *Id.*, at 307 (plurality opinion) (quoting *Mackey* v. *United States*, 401 U. S. 667, 692 (1971) (Harlan, J., concurring in judgments in part and dissenting in part)). When the Court holds as a new rule in a subsequent case that a particular species of primary, private individual conduct is beyond the power of the criminal lawmaking authority to proscribe, it necessarily follows that this Court has "made" that new rule retroactive to cases on collateral review. The Court has done so through its holdings alone, without resort to dicta and without any application of principles by lower courts.

The matter is less straightforward with respect to the second *Teague* exception, which is reserved for "watershed

rules of criminal procedure," 489 U. S., at 311 (plurality opinion). A case announcing a new rule could conceivably hold that infringement of the rule "seriously diminish[es] the likelihood of obtaining an accurate conviction," *id.*, at 315, and that the rule "'alter[s] our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding,'" *id.*, at 311 (plurality opinion) (quoting *Mackey*, *supra*, at 693 (Harlan, J., concurring in judgments in part and dissenting in part)); see also *Sawyer* v. *Smith*, 497 U. S. 227, 242 (1990), without holding in so many words that the rule "applies retroactively" and without actually applying that rule retroactively to a case on collateral review. The "precise contours" of this *Teague* exception, of course, "may be difficult to discern," *Saffle* v. *Parks*, 494 U. S. 484, 495 (1990), and the judgment involved in our "ma[king]" a new rule retroactive under this exception is likely to be more subjective and self-conscious than is the case with *Teague*'s first exception. But the relevant inquiry is not whether the new rule comes within the *Teague* exception at all, but the more narrow and manageable inquiry of whether this Court's holdings, by strict logical necessity, "ma[k]e" the new rule retroactive within the meaning of § 2244(b)(2)(A). While such logical necessity does not obtain in this particular case, *ante*, at 665–667, this Court could "ma[k]e" a new rule retroactive under *Teague*'s second exception in this manner.

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

In *Cage* v. *Louisiana*, 498 U. S. 39 (1990) *(per curiam)*, this Court held that a certain jury instruction violated the Constitution because it inaccurately defined "reasonable doubt," thereby permitting a jury to convict "based on a degree of proof below that required by the Due Process Clause." *Id.*, at 41. Here we must decide whether this Court has "made" *Cage* "retroactive to cases on collateral

review." 28 U. S. C. § 2244(b)(2)(A) (1994 ed., Supp. V). I believe that it has.

The Court made *Cage* retroactive in two cases taken together. Case One is *Teague* v. *Lane*, 489 U. S. 288 (1989). That case, as the majority says, held (among other things) that a new rule is applicable retroactively to cases on collateral review if (1) infringement of the new rule will "seriously diminish the likelihood of obtaining an accurate conviction," *id.*, at 315 (plurality opinion), and (2) the new rule "'alter[s] our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction,'" *id.*, at 311 (plurality opinion) (quoting *Mackey* v. *United States*, 401 U. S. 667, 693 (1971) (Harlan, J., concurring in judgments in part and dissenting in part)) (emphasis deleted).

Case Two is *Sullivan* v. *Louisiana*, 508 U. S. 275 (1993). This Court decided *Sullivan* after several lower courts had held that *Cage*'s rule did not fall within the *Teague* "watershed" exception I have just mentioned. See, *e. g.*, *Adams* v. *Aiken*, 965 F. 2d 1306, 1312 (CA4 1992), vacated, 511 U. S. 1001 (1994); *Skelton* v. *Whitley*, 950 F. 2d 1037, 1045 (CA5), cert. denied, 506 U. S. 833 (1992). The question in *Sullivan* was whether a violation of the *Cage* rule could ever count as harmless error. The Court answered that question in the negative. In so concluding, the Court reasoned that an instruction that violated *Cage* by misdescribing the concept of reasonable doubt "vitiates *all* the jury's findings," and deprives a criminal defendant of a "basic protection . . . without which a criminal trial cannot reliably serve its function." *Sullivan*, *supra*, at 281 (emphasis in original; internal quotation marks omitted). It renders the situation as if "there has been no jury verdict within the meaning of the Sixth Amendment." 508 U. S., at 280.

To reason as the Court reasoned in *Sullivan* is to hold (in *Teague*'s language) (1) that infringement of the *Cage* rule "seriously diminish[es] the likelihood of obtaining an accurate

conviction," *Teague*, *supra*, at 315 (plurality opinion), and (2) that *Cage* "alter[s] our understanding of the bedrock procedural elements" that are essential to the fairness of a criminal trial, 489 U. S., at 311 (plurality opinion) (internal quotation marks omitted; emphasis deleted). That is because an instruction that makes "*all* the jury's findings" untrustworthy, *Sullivan*, *supra*, at 281, must "diminish the likelihood of obtaining an accurate conviction," *Teague*, *supra*, at 315 (plurality opinion). It is because a deprivation of a "basic protection" needed for a trial to "serve its function," *Sullivan*, *supra*, at 281 (internal quotation marks omitted), is a deprivation of a "bedrock procedural elemen[t]," *Teague*, *supra*, at 311 (plurality opinion) (internal quotation marks omitted). And it is because *Cage* significantly "alter[ed]" pre-existing law. 489 U. S., at 311. That is what every Court of Appeals to have considered the matter has concluded. See *Tillman* v. *Cook*, 215 F. 3d 1116, 1122 (CA10), cert. denied, 531 U. S. 1055 (2000); *West* v. *Vaughn*, 204 F. 3d 53, 61, and n. 9 (CA3 2000); *Gaines* v. *Kelly*, 202 F. 3d 598, 604–605 (CA2 2000); *Humphrey* v. *Cain*, 138 F. 3d 552, 553 (CA5) (en banc), cert. denied, 525 U. S. 935 (1998); *Adams* v. *Aiken*, 41 F. 3d 175, 178–179 (CA4 1994), cert. denied, 515 U. S. 1124 (1995); *Nutter* v. *White*, 39 F. 3d 1154, 1158 (CA11 1994). But cf. *In re Smith*, 142 F. 3d 832, 835–836 (CA5 1998) (concluding that explicit Supreme Court statement is necessary to make *Cage* retroactive for second or successive habeas purposes); *Rodriguez* v. *Superintendent, Bay State Correctional Ctr.*, 139 F. 3d 270, 275–276 (CA1 1998) (same); *In re Hill*, 113 F. 3d 181, 184 (CA11 1997) (same). And I do not see how the majority can deny that this is so.

Consequently, *Sullivan*, in holding that a *Cage* violation can never be harmless because it leaves the defendant with no jury verdict known to the Sixth Amendment, also holds that *Cage* falls within *Teague*'s "watershed" exception. The matter is one of logic. If Case One holds that all men are

mortal and Case Two holds that Socrates is a man, we do not need Case Three to hold that Socrates is mortal. It is also a matter of law. If Case One holds that a party's expectation measures damages for breach of contract and Case Two holds that Circumstances X, Y, and Z create a binding contract, we do not need Case Three to hold that in those same circumstances expectation damages are awarded for breach. Ordinarily, in law, to hold that a set of circumstances falls within a particular legal category is simultaneously to hold that, other things being equal, the normal legal characteristics of members of that category apply to those circumstances.

The majority says that *Sullivan*'s only "holding" is that *Cage* error is structural, and that this "holding" does not dictate the "watershed" nature of the *Cage* rule. See *ante*, at 665–666. But the majority fails to identify a meaningful difference between the definition of a watershed rule under *Teague* and the standard that we have articulated in the handful of instances in which we have held errors structural, namely, that structural errors deprive a defendant of a "'basic protectio[n]'" without which a "'trial cannot reliably serve its function as a vehicle for determination of guilt or innocence'" to the point where "'no criminal punishment may be regarded as fundamentally fair.'" *Arizona* v. *Fulminante*, 499 U. S. 279, 310 (1991) (quoting *Rose* v. *Clark*, 478 U. S. 570, 577–578 (1986)); see also *Neder* v. *United States*, 527 U. S. 1, 8 (1999) (identifying the six kinds of error, including *Cage* error, that have been held structural). In principle *Teague* also adds an element that "structural error" alone need not encompass, namely, the requirement that a violation of the rule must undermine *accuracy*. But that additional accuracy requirement poses no problem here, for our language in *Sullivan* could not have made clearer that *Cage* error seriously undermines the accuracy and reliability of a guilty verdict.

Of course, as the majority points out, identifying an error as structural need not "alter our understanding of th[e] fun-

damental procedural elements" that are essential to a fair trial. See *ante*, at 666, n. 7. But this "altering" requirement is not a problem here. No one denies that *Cage*'s rule was a new one. "Whether a trial court's unconstitutional misdescription of the burden of proof in a criminal case violates the Due Process Clause was certainly an open question before *Cage*." *Adams*, 41 F. 3d, at 178; see also *Gaines*, *supra*, at 606–607 (noting that *Cage* led to reversals of numerous convictions that had been based on similar reasonable-doubt instruction); *State* v. *Humphrey*, 544 So. 2d 1188, 1192 (La. App.) (citing multiple decisions by Louisiana Supreme Court which had upheld reasonable-doubt instructions like that invalidated in *Cage*), cert. denied, 550 So. 2d 627 (1989). And our holding that such a misdescription of the burden of proof means that "there has been no jury verdict within the meaning of the Sixth Amendment," *Sullivan*, 508 U. S., at 280, certainly altered the understanding of the significance of such an error.

Insofar as the majority means to suggest that a rule may be sufficiently "new" that it does not apply retroactively but not "new enough" to qualify for the watershed exception, I note only that the cases establishing this exception suggest no such requirement. Rather than focus on the "degree of newness" of a new rule, these decisions emphasize that watershed rules are those that form part of the fundamental requirements of due process. See *Teague*, 489 U. S., at 311–312 (plurality opinion); *Mackey*, 401 U. S., at 693–694 (Harlan, J., concurring in judgments in part and dissenting in part); cf. *O'Dell* v. *Netherland*, 521 U. S. 151, 167 (1997) (holding that "narrow right of rebuttal" established by *Simmons* v. *South Carolina*, 512 U. S. 154 (1994), "has hardly alter[ed] our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding" (internal quotation marks omitted; emphasis in original)); *Caspari* v. *Bohlen*, 510 U. S. 383, 396 (1994) (holding that application of double jeopardy bar to successive noncapital sentencing would not be unfair and would enhance rather than hinder

accuracy); *Sawyer* v. *Smith*, 497 U. S. 227, 242–244 (1990) (holding that rule which "provid[ed] an additional measure of protection" to existing prohibition on prosecutorial remarks that render a proceeding "fundamentally unfair" was not "an 'absolute prerequisite to fundamental fairness' " that would fall within the second *Teague* exception) (quoting *Teague*, *supra*, at 314 (plurality opinion)).

Nor does the majority explain why the reasoning that was necessary to our holding in *Sullivan* (and is therefore binding upon all courts) lacks enough legal force to "make" the *Cage* rule retroactive. Cf. *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 67 (1996) ("We adhere . . . not to mere *obiter dicta*, but rather to the well-established rationale upon which the Court based the results of its earlier decisions. When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound"); *Burnham* v. *Superior Court of Cal., County of Marin*, 495 U. S. 604, 613, n. 2 (1990) (plurality opinion) (exclusive basis for judgment is not dicta). In any event, technical issues about what constitutes a "holding" are beside the point. The statutory provision before us does not use the words "holding" or "held." But cf. *ante*, at 664 (majority opinion) (stating without explanation that "made" means "held"). It uses the word "made." It refers to instances in which the Supreme Court has *"made"* a rule of law "retroactive to cases on collateral review." 28 U. S. C. § 2244(b)(2)(A) (1994 ed., Supp. V) (emphasis added). And that is just what the Supreme Court, through *Teague* and *Sullivan*, has done with respect to the rule of *Cage*.

I agree with JUSTICE O'CONNOR—as does a majority of the Court—when (in describing a *different Teague* exception) she says that "[w]hen the Court holds as a new rule in a subsequent case that a particular species of primary, private individual conduct is beyond the power of the criminal lawmaking authority to proscribe, it necessarily follows that this Court has 'made' that new rule retroactive to cases on collateral review." *Ante*, at 669 (concurring opinion). But I do

not understand why a decision by this Court which makes it apparent that a rule is retroactive under *Teague*'s second exception will necessarily be "more subjective and self-conscious." *Ante*, at 670 (concurring opinion). Of course, it will sometimes be difficult to decide whether an earlier Supreme Court case has satisfied the watershed rule's requirements. But that is not so here. In *Sullivan*, this Court used language that unmistakably stated that a defective reasonable-doubt instruction undermines the accuracy of a trial and deprives the defendant of a bedrock element that is essential to the fairness of a criminal proceeding. That is sufficient to make *Teague*'s watershed exception applicable.

I would add two further points. First, nothing in the statute's purpose favors, let alone requires, the majority's conclusion. That purpose, as far as I can surmise, is to bar successive petitions when lower courts, but not the Supreme Court, have held a rule not to be "new" under *Teague* because dictated by their own precedent, cf. *Dyer* v. *Calderon*, 151 F. 3d 970, 993–995 (CA9) (en banc) (O'Scannlain, J., dissenting) (rejecting proposition that lower court decisions can establish rule for *Teague* purposes), cert. denied, 525 U. S. 1033 (1998); *Clemmons* v. *Delo*, 124 F. 3d 944, 955, n. 11 (CA8 1997) (assuming, without deciding, that only Supreme Court precedent may dictate rule so that it is not new for *Teague* purposes), cert. denied, 523 U. S. 1088 (1998), or when lower courts have themselves adopted new rules and then determined that the *Teague* retroactivity factors apply, see *Smith* v. *Groose*, 205 F. 3d 1045, 1054 (CA8) (holding that Circuit rule that prosecution's use of contradictory theories violates due process would fall within *Teague*'s "watershed" exception), cert. denied *sub nom. Gammon* v. *Smith*, 531 U. S. 985 (2000); *Sanders* v. *Sullivan*, 900 F. 2d 601, 606–607 (CA2 1990) (same, with respect to Circuit rule that prosecution's unknowing use of material, perjured testimony violates Constitution). Here, consistent with such a purpose, the Supreme Court has previously spoken.

Second, the most likely consequence of the majority's holding is further procedural complexity. After today's opinion, the only way in which this Court can make a rule such as *Cage*'s retroactive is to repeat its *Sullivan* reasoning in a case triggered by a prisoner's filing a first habeas petition (a "second or successive" petition itself being barred by the provision here at issue) or in some other case that presents the issue in a posture that allows such language to have the status of a "holding." Then, after the Court takes the case and says that it meant what it previously said, prisoners could file "second or successive" petitions to take advantage of the now-clearly-made-applicable new rule. We will be required to restate the obvious, case by case, even when we have explicitly said, but not "held," that a new rule is retroactive. See, *e. g.*, *Penry* v. *Lynaugh*, 492 U. S. 302, 330 (1989) (stating that, if Court were to hold that Eighth Amendment prohibits execution of persons with mental retardation, this rule would be retroactively applicable on collateral review).

Even this complex route will remain open only if the relevant statute of limitations is interpreted to permit its 1-year filing period to run from the time that this Court has "made" a new rule retroactive, not from the time it initially recognized that new right. See 28 U. S. C. § 2244(d)(1)(C) (1994 ed., Supp. V) (limitations period runs from "the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review"). Otherwise, the Court's approach will generate not only complexity, along with its attendant risk of confusion, but also serious additional unfairness.

I do not understand the basis for the Court's approach. I fear its consequences. For these reasons, with respect, I dissent.

Syllabus

ZADVYDAS *v.* DAVIS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 99–7791. Argued February 21, 2001—Decided June 28, 2001*

After a final removal order is entered, an alien ordered removed is held in custody during a 90-day removal period. If the alien is not removed in those 90 days, the post-removal-period detention statute authorizes further detention or supervised release, subject to administrative review. Kestutis Zadvydas, petitioner in No. 99–7791—a resident alien born, apparently of Lithuanian parents, in a German displaced persons camp—was ordered deported based on his criminal record. Germany and Lithuania refused to accept him because he was not a citizen of their countries; efforts to send him to his wife's native country also failed. When he remained in custody after the removal period expired, he filed a habeas action under 28 U. S. C. § 2241. The District Court granted the writ, reasoning that, because the Government would never remove him, his confinement would be permanent, in violation of the Constitution. In reversing, the Fifth Circuit concluded that Zadvydas' detention did not violate the Constitution because eventual deportation was not impossible, good-faith efforts to remove him continued, and his detention was subject to administrative review. Kim Ho Ma, respondent in No. 00–38, is a resident alien born in Cambodia who was ordered removed based on his aggravated felony conviction. When he remained in custody after the removal period expired, he filed a § 2241 habeas petition. In ordering his release, the District Court held that the Constitution forbids post-removal-period detention unless there is a realistic chance that an alien will be removed, and that no such chance existed here because Cambodia has no repatriation treaty with the United States. The Ninth Circuit affirmed, concluding that detention was not authorized for more than a reasonable time beyond the 90-day period, and that, given the lack of a repatriation agreement, that time had expired.

Held:

1. Section 2241 habeas proceedings are available as a forum for statutory and constitutional challenges to post-removal-period detention. Statutory changes in the immigration law left habeas untouched as the

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*Together with No. 00–38, *Ashcroft, Attorney General, et al.* v. *Kim Ho Ma*, on certiorari to the United States Court of Appeals for the Ninth Circuit.

basic method for obtaining review of continued custody after a deportation order becomes final, and none of the statutory provisions limiting judicial review of removal decisions applies here. Pp. 687–688.

2. The post-removal-period detention statute, read in light of the Constitution's demands, implicitly limits an alien's detention to a period reasonably necessary to bring about that alien's removal from the United States, and does not permit indefinite detention. Pp. 688–699.

(a) A statute permitting indefinite detention would raise serious constitutional questions. Freedom from imprisonment lies at the heart of the liberty protected by the Due Process Clause. Government detention violates the Clause unless it is ordered in a criminal proceeding with adequate procedural safeguards or a special justification outweighs the individual's liberty interest. The instant proceedings are civil and assumed to be nonpunitive, and the Government proffers no sufficiently strong justification for indefinite civil detention under this statute. The first justification—preventing flight—is weak or nonexistent where removal seems a remote possibility. Preventive detention based on the second justification—protecting the community—has been upheld only when limited to specially dangerous individuals and subject to strong procedural protections. When preventive detention is potentially indefinite, this dangerousness rationale must also be accompanied by some other special circumstance, such as mental illness, that helps to create the danger. The civil confinement here is potentially permanent, and once the flight risk justification evaporates, the only special circumstance is the alien's removable status, which bears no relation to dangerousness. Moreover, the sole procedural protections here are found in administrative proceedings, where the alien bears the burden of proving he is not dangerous, without (according to the Government) significant later judicial review. The Constitution may well preclude granting an administrative body unreviewable authority to make determinations implicating fundamental rights. Pp. 690–692.

(b) *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206—in which an alien was indefinitely detained as he attempted to reenter the country—does not support the Government's argument that alien status itself can justify indefinite detention. Once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all persons within the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent. Nor do cases holding that, because Congress has plenary power to create immigration law, the Judicial Branch must defer to Executive and Legislative Branch decisionmaking in that area help the Government, because that power is subject to constitutional limits. Finally, the aliens' liberty interest is not diminished by their lack of a legal right to live at large, for the choice at issue here is between imprisonment and supervision under

release conditions that may not be violated and their liberty interest is strong enough to raise a serious constitutional problem with indefinite detention. Pp. 692–696.

(c) Despite the constitutional problem here, if this Court were to find a clear congressional intent to grant the Attorney General the power to indefinitely detain an alien ordered removed, the Court would be required to give it effect. But this Court finds no clear indication of such intent. The statute's use of "may" is ambiguous and does not necessarily suggest unlimited discretion. Similar related statutes requiring detention of criminal aliens during removal proceedings and the removal period do not show that Congress authorized indefinite detention here. Finally, nothing in the statute's legislative history clearly demonstrates a congressional intent to authorize indefinite, perhaps permanent, detention. Pp. 696–699.

3. The application of the "reasonable time" limitation is subject to federal-court review. The basic federal habeas statute grants the federal courts authority to determine whether post-removal-period detention is pursuant to statutory authority. In answering that question, the court must ask whether the detention exceeds a period reasonably necessary to secure removal. It should measure reasonableness primarily in terms of the statute's purpose of assuring the alien's presence at the moment of removal. Thus, if removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized. If it is foreseeable, the court should consider the risk of the alien's committing further crimes as a factor potentially justifying continued confinement. Without abdicating their responsibility to review the detention's lawfulness, the courts can take appropriate account of such matters as the Executive Branch's greater immigration-related expertise, the Immigration and Naturalization Service's administrative needs and concerns, and the Nation's need to speak with one voice on immigration. In order to limit the occasions when courts will need to make the difficult judgments called for by the recognition of this necessary Executive leeway, it is practically necessary to recognize a presumptively reasonable period of detention. It is unlikely that Congress believed that all reasonably foreseeable removals could be accomplished in 90 days, but there is reason to believe that it doubted the constitutionality of more than six months' detention. Thus, for the sake of uniform administration in the federal courts, six months is the appropriate period. After the 6-month period, once an alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must furnish evidence sufficient to rebut that showing. Pp. 699–701.

Syllabus

4. The standard that the Fifth Circuit applied in holding Zadvydas' continued detention lawful seems to require an alien seeking release to show the absence of *any* prospect of removal—no matter how unlikely or unforeseeable—and thus demands more than the statute can bear. The Ninth Circuit's conclusion that Ma should be released may have rested solely upon the absence of a repatriation agreement without giving due weight to the likelihood of successful future negotiations. P. 702.

185 F. 3d 279 and 208 F. 3d 815, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, SOUTER, and GINSBURG, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 702. KENNEDY, J., filed a dissenting opinion, in which REHNQUIST, C. J., joined, and in which SCALIA and THOMAS, JJ., joined as to Part I, *post*, p. 705.

Jay W. Stansell argued the cause for respondent in No. 00–38. With him on the brief were *Thomas W. Hillier II* and *Jennifer E. Wellman.*

Robert F. Barnard argued the cause for petitioner in No. 99–7791. With him on the briefs was *Virginia Laughlin Schlueter.*

Deputy Solicitor General Kneedler argued the cause for respondents in No. 99–7791 and petitioners in No. 00–38. With him on the briefs were *Acting Solicitor General Underwood,* former *Solicitor General Waxman, Assistant Attorney General Ogden, Beth S. Brinkmann, Donald Keener,* and *Quynh Vu.**

**Daniel J. Popeo* and *Richard A. Samp* filed a brief for the Washington Legal Foundation et al. as *amici curiae* urging affirmance in No. 99–7791.

Briefs of *amici curiae* urging affirmance in No. 00–38 were filed for the Catholic Legal Immigration Network, Inc., et al. by *Laurie Joyce* and *Josh Dratel;* for the American Association of Jews from the Former USSR et al. by *Nancy Morawetz;* for the Lawyers Committee for Human Rights by *Seth M. M. Stodder;* for the American Civil Liberties Union et al. by *Judy Rabinovitz, Lucas Guttentag, Steven R. Shapiro, Wanyong Lai Austin, Jayashri Srikantiah,* and *Aaron H. Caplan;* for Human Rights Watch et al. by *William J. Aceves* and *Paul L. Hoffman;* and for Carolyn Patty Blum et al. by *George A. Cumming, Jr.,* and *Charles D. Weisselberg.*

JUSTICE BREYER delivered the opinion of the Court.

When an alien has been found to be unlawfully present in the United States and a final order of removal has been entered, the Government ordinarily secures the alien's removal during a subsequent 90-day statutory "removal period," during which time the alien normally is held in custody.

A special statute authorizes further detention if the Government fails to remove the alien during those 90 days. It says:

> "An alien ordered removed [1] who is inadmissible . . . [2] [or] removable [as a result of violations of status requirements or entry conditions, violations of criminal law, or reasons of security or foreign policy] or [3] who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to [certain] terms of supervision . . . ." 8 U. S. C. § 1231(a)(6) (1994 ed., Supp. V).

In these cases, we must decide whether this post-removal-period statute authorizes the Attorney General to detain a removable alien *indefinitely* beyond the removal period or only for a period *reasonably necessary* to secure the alien's removal. We deal here with aliens who were admitted to the United States but subsequently ordered removed. Aliens who have not yet gained initial admission to this country would present a very different question. See *infra*, at 693–694. Based on our conclusion that indefinite detention of aliens in the former category would raise serious constitutional concerns, we construe the statute to contain an implicit "reasonable time" limitation, the application of which is subject to federal-court review.

I

A

The post-removal-period detention statute is one of a related set of statutes and regulations that govern detention during and after removal proceedings. While removal proceedings are in progress, most aliens may be released on bond or paroled. 66 Stat. 204, as added and amended, 110 Stat. 3009–585, 8 U. S. C. §§ 1226(a)(2), (c) (1994 ed., Supp. V). After entry of a final removal order and during the 90-day removal period, however, aliens must be held in custody. § 1231(a)(2). Subsequently, as the post-removal-period statute provides, the Government "may" continue to detain an alien who still remains here or release that alien under supervision. § 1231(a)(6).

Related Immigration and Naturalization Service (INS) regulations add that the INS District Director will initially review the alien's records to decide whether further detention or release under supervision is warranted after the 90-day removal period expires. 8 CFR §§ 241.4(c)(1), (h), (k)(1)(i) (2001). If the decision is to detain, then an INS panel will review the matter further, at the expiration of a 3-month period or soon thereafter. § 241.4(k)(2)(ii). And the panel will decide, on the basis of records and a possible personal interview, between still further detention or release under supervision. § 241.4(i). In making this decision, the panel will consider, for example, the alien's disciplinary record, criminal record, mental health reports, evidence of rehabilitation, history of flight, prior immigration history, and favorable factors such as family ties. § 241.4(f). To authorize release, the panel must find that the alien is not likely to be violent, to pose a threat to the community, to flee if released, or to violate the conditions of release. § 241.4(e). And the alien must demonstrate "to the satisfaction of the Attorney General" that he will pose no danger or risk of flight.

§ 241.4(d)(1). If the panel decides against release, it must review the matter again within a year, and can review it earlier if conditions change. §§ 241.4(k)(2)(iii), (v).

B

1

We consider two separate instances of detention. The first concerns Kestutis Zadvydas, a resident alien who was born, apparently of Lithuanian parents, in a displaced persons camp in Germany in 1948. When he was eight years old, Zadvydas immigrated to the United States with his parents and other family members, and he has lived here ever since.

Zadvydas has a long criminal record, involving drug crimes, attempted robbery, attempted burglary, and theft. He has a history of flight, from both criminal and deportation proceedings. Most recently, he was convicted of possessing, with intent to distribute, cocaine; sentenced to 16 years' imprisonment; released on parole after two years; taken into INS custody; and, in 1994, ordered deported to Germany. See 8 U. S. C. § 1251(a)(2) (1988 ed., Supp. V) (delineating crimes that make alien deportable).

In 1994, Germany told the INS that it would not accept Zadvydas because he was not a German citizen. Shortly thereafter, Lithuania refused to accept Zadvydas because he was neither a Lithuanian citizen nor a permanent resident. In 1996, the INS asked the Dominican Republic (Zadvydas' wife's country) to accept him, but this effort proved unsuccessful. In 1998, Lithuania rejected, as inadequately documented, Zadvydas' effort to obtain Lithuanian citizenship based on his parents' citizenship; Zadvydas' reapplication is apparently still pending.

The INS kept Zadvydas in custody after expiration of the removal period. In September 1995, Zadvydas filed a petition for a writ of habeas corpus under 28 U. S. C. § 2241 chal-

lenging his continued detention. In October 1997, a Federal District Court granted that writ and ordered him released under supervision. *Zadvydas* v. *Caplinger*, 986 F. Supp. 1011, 1027–1028 (ED La.). In its view, the Government would never succeed in its efforts to remove Zadvydas from the United States, leading to his permanent confinement, contrary to the Constitution. *Id.*, at 1027.

The Fifth Circuit reversed this decision. *Zadvydas* v. *Underdown*, 185 F. 3d 279 (1999). It concluded that Zadvydas' detention did not violate the Constitution because eventual deportation was not "impossible," good-faith efforts to remove him from the United States continued, and his detention was subject to periodic administrative review. *Id.*, at 294, 297. The Fifth Circuit stayed its mandate pending potential review in this Court.

2

The second case is that of Kim Ho Ma. Ma was born in Cambodia in 1977. When he was two, his family fled, taking him to refugee camps in Thailand and the Philippines and eventually to the United States, where he has lived as a resident alien since the age of seven. In 1995, at age 17, Ma was involved in a gang-related shooting, convicted of manslaughter, and sentenced to 38 months' imprisonment. He served two years, after which he was released into INS custody.

In light of his conviction of an "aggravated felony," Ma was ordered removed. See 8 U. S. C. §§ 1101(a)(43)(F) (defining certain violent crimes as aggravated felonies), 1227(a)(2)(A)(iii) (1994 ed., Supp. IV) (aliens convicted of aggravated felonies are deportable). The 90-day removal period expired in early 1999, but the INS continued to keep Ma in custody, because, in light of his former gang membership, the nature of his crime, and his planned participation in a prison hunger strike, it was "unable to conclude that

Mr. Ma would remain nonviolent and not violate the conditions of release." App. to Pet. for Cert. in No. 00–38, p. 87a.

In 1999, Ma filed a petition for a writ of habeas corpus under 28 U. S. C. § 2241. A panel of five judges in the Federal District Court for the Western District of Washington, considering Ma's and about 100 similar cases together, issued a joint order holding that the Constitution forbids post-removal-period detention unless there is "a realistic chance that [the] alien will be deported" (thereby permitting classification of the detention as "in aid of deportation"). *Binh Phan* v. *Reno*, 56 F. Supp. 2d 1149, 1156 (1999). The District Court then held an evidentiary hearing, decided that there was no "realistic chance" that Cambodia (which has no repatriation treaty with the United States) would accept Ma, and ordered Ma released. App. to Pet. for Cert. in No. 00–38, at 60a–61a.

The Ninth Circuit affirmed Ma's release. *Kim Ho Ma* v. *Reno*, 208 F. 3d 815 (2000). It concluded, based in part on constitutional concerns, that the statute did not authorize detention for more than a "reasonable time" beyond the 90-day period authorized for removal. *Id.*, at 818. And, given the lack of a repatriation agreement with Cambodia, that time had expired upon passage of the 90 days. *Id.*, at 830–831.

3

Zadvydas asked us to review the decision of the Fifth Circuit authorizing his continued detention. The Government asked us to review the decision of the Ninth Circuit forbidding Ma's continued detention. We granted writs in both cases, agreeing to consider both statutory and related constitutional questions. See also *Duy Dac Ho* v. *Greene*, 204 F. 3d 1045, 1060 (CA10 2000) (upholding Attorney General's statutory and constitutional authority to detain alien indefinitely). We consolidated the two cases for argument; and we now decide them together.

II

We note at the outset that the primary federal habeas corpus statute, 28 U. S. C. § 2241, confers jurisdiction upon the federal courts to hear these cases. See § 2241(c)(3) (authorizing any person to claim in federal court that he or she is being held "in custody in violation of the Constitution or laws . . . of the United States"). Before 1952, the federal courts considered challenges to the lawfulness of immigration-related detention, including challenges to the validity of a deportation order, in habeas proceedings. See *Heikkila* v. *Barber*, 345 U. S. 229, 230, 235–236 (1953). Beginning in 1952, an alternative method for review of *deportation orders*, namely, actions brought in federal district court under the Administrative Procedure Act (APA), became available. See *Shaughnessy* v. *Pedreiro*, 349 U. S. 48, 51–52 (1955). And in 1961 Congress replaced district court APA review with initial *deportation order* review in courts of appeals. See Act of Sept. 26, 1961, § 5, 75 Stat. 651 (formerly codified at 8 U. S. C. § 1105a(a)) (repealed 1996). The 1961 Act specified that federal habeas courts were also available to hear statutory and constitutional challenges to *deportation* (and exclusion) *orders*. See 8 U. S. C. §§ 1105a(a)(10), (b) (repealed 1996). These statutory changes left habeas untouched as the basic method for obtaining review of continued *custody after* a deportation order had become final. See *Cheng Fan Kwok* v. *INS*, 392 U. S. 206, 212, 215–216 (1968) (holding that § 1105a(a) applied only to challenges to determinations made during deportation proceedings and motions to reopen those proceedings).

More recently, Congress has enacted several statutory provisions that limit the circumstances in which judicial review of deportation decisions is available. But none applies here. One provision, 8 U. S. C. § 1231(h) (1994 ed., Supp. V), simply forbids courts to construe *that section* "to create any . . . procedural right or benefit that is legally enforce-

able"; it does not deprive an alien of the right to rely on 28 U. S. C. § 2241 to challenge detention that is without statutory authority.

Another provision, 8 U. S. C. § 1252(a)(2)(B)(ii) (1994 ed., Supp. V), says that "no court shall have jurisdiction to review" decisions "specified . . . to be in the discretion of the Attorney General." The aliens here, however, do not seek review of the Attorney General's exercise of discretion; rather, they challenge the extent of the Attorney General's authority under the post-removal-period detention statute. And the extent of that authority is not a matter of discretion. See also, *e. g.*, § 1226(e) (applicable to certain detention-related decisions *in period preceding entry* of final removal order); § 1231(a)(4)(D) (applicable to assertion of causes or claims *under § 1231(a)(4)*, which is not at issue here); §§ 1252(a)(1), (a)(2)(C) (applicable to judicial review of "final order[s] of removal"); § 1252(g) (applicable to decisions "to commence proceedings, adjudicate cases, or execute removal orders").

We conclude that § 2241 habeas corpus proceedings remain available as a forum for statutory and constitutional challenges to post-removal-period detention. And we turn to the merits of the aliens' claims.

III

The post-removal-period detention statute applies to certain categories of aliens who have been ordered removed, namely, inadmissible aliens, criminal aliens, aliens who have violated their nonimmigrant status conditions, and aliens removable for certain national security or foreign relations reasons, as well as any alien "who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal." 8 U. S. C. § 1231(a)(6) (1994 ed., Supp. V); see also 8 CFR § 241.4(a) (2001). It says that an alien who falls into one of these cate-

gories "may be detained beyond the removal period and, if released, shall be subject to [certain] terms of supervision." 8 U. S. C. § 1231(a)(6) (1994 ed., Supp. V).

The Government argues that the statute means what it literally says. It sets no "limit on the length of time beyond the removal period that an alien who falls within one of the Section 1231(a)(6) categories may be detained." Brief for Petitioners in No. 00–38, p. 22. Hence, "whether to continue to detain such an alien and, if so, in what circumstances and for how long" is up to the Attorney General, not up to the courts. *Ibid.*

"[I]t is a cardinal principle" of statutory interpretation, however, that when an Act of Congress raises "a serious doubt" as to its constitutionality, "this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932); see also *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 78 (1994); *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401 (1916); cf. *Almendarez-Torres* v. *United States*, 523 U. S. 224, 238 (1998) (construction of statute that avoids invalidation best reflects congressional will). We have read significant limitations into other immigration statutes in order to avoid their constitutional invalidation. See *United States* v. *Witkovich*, 353 U. S. 194, 195, 202 (1957) (construing a grant of authority to the Attorney General to ask aliens whatever questions he "deem[s] fit and proper" as limited to questions "reasonably calculated to keep the Attorney General advised regarding the continued availability for departure of aliens whose deportation is overdue"). For similar reasons, we read an implicit limitation into the statute before us. In our view, the statute, read in light of the Constitution's demands, limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States. It does not permit indefinite detention.

A

A statute permitting indefinite detention of an alien would raise a serious constitutional problem. The Fifth Amendment's Due Process Clause forbids the Government to "depriv[e]" any "person . . . of . . . liberty . . . without due process of law." Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects. See *Foucha* v. *Louisiana*, 504 U. S. 71, 80 (1992). And this Court has said that government detention violates that Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, see *United States* v. *Salerno*, 481 U. S. 739, 746 (1987), or, in certain special and "narrow" nonpunitive "circumstances," *Foucha*, *supra*, at 80, where a special justification, such as harm-threatening mental illness, outweighs the "individual's constitutionally protected interest in avoiding physical restraint." *Kansas* v. *Hendricks*, 521 U. S. 346, 356 (1997).

The proceedings at issue here are civil, not criminal, and we assume that they are nonpunitive in purpose and effect. There is no sufficiently strong special justification here for indefinite civil detention—at least as administered under this statute. The statute, says the Government, has two regulatory goals: "ensuring the appearance of aliens at future immigration proceedings" and "[p]reventing danger to the community." Brief for Respondents in No. 99–7791, p. 24. But by definition the first justification—preventing flight—is weak or nonexistent where removal seems a remote possibility at best. As this Court said in *Jackson* v. *Indiana*, 406 U. S. 715 (1972), where detention's goal is no longer practically attainable, detention no longer "bear[s] [a] reasonable relation to the purpose for which the individual [was] committed." *Id.*, at 738.

The second justification—protecting the community—does not necessarily diminish in force over time. But we have

upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections. Compare *Hendricks, supra,* at 368 (upholding scheme that imposes detention upon "a small segment of particularly dangerous individuals" and provides "strict procedural safeguards"), and *Salerno, supra,* at 747, 750–752 (in upholding pretrial detention, stressing "stringent time limitations," the fact that detention is reserved for the "most serious of crimes," the requirement of proof of dangerousness by clear and convincing evidence, and the presence of judicial safeguards), with *Foucha, supra,* at 81–83 (striking down insanity-related detention system that placed burden on detainee to prove nondangerousness). In cases in which preventive detention is of potentially *indefinite* duration, we have also demanded that the dangerousness rationale be accompanied by some other special circumstance, such as mental illness, that helps to create the danger. See *Hendricks, supra,* at 358, 368.

The civil confinement here at issue is not limited, but potentially permanent. Cf. *Salerno, supra,* at 747 (noting that "maximum length of pretrial detention is limited" by "stringent" requirements); *Carlson* v. *Landon,* 342 U. S. 524, 545–546 (1952) (upholding temporary detention of alien during deportation proceeding while noting that "problem of . . . unusual delay" was not present). The provision authorizing detention does not apply narrowly to "a small segment of particularly dangerous individuals," *Hendricks, supra,* at 368, say, suspected terrorists, but broadly to aliens ordered removed for many and various reasons, including tourist visa violations. See 8 U. S. C. § 1231(a)(6) (1994 ed., Supp. V) (referencing § 1227(a)(1)(C)); cf. *Hendricks,* 521 U. S., at 357–358 (only individuals with "past sexually violent behavior and a present mental condition that creates a likelihood of such conduct in the future" may be detained). And, once the flight risk justification evaporates, the only special cir-

cumstance present is the alien's removable status itself, which bears no relation to a detainee's dangerousness. Cf. *id.*, at 358; *Foucha*, *supra*, at 82.

Moreover, the sole procedural protections available to the alien are found in administrative proceedings, where the alien bears the burden of proving he is not dangerous, without (in the Government's view) significant later judicial review. Compare 8 CFR § 241.4(d)(1) (2001) (imposing burden of proving nondangerousness upon alien) with *Foucha*, *supra*, at 82 (striking down insanity-related detention for that very reason). This Court has suggested, however, that the Constitution may well preclude granting "an administrative body the unreviewable authority to make determinations implicating fundamental rights." *Superintendent, Mass. Correctional Institution at Walpole* v. *Hill*, 472 U. S. 445, 450 (1985) (O'CONNOR, J.); see also *Crowell*, 285 U. S., at 87 (Brandeis, J., dissenting) ("[U]nder certain circumstances, the constitutional requirement of due process is a requirement of judicial process"). The Constitution demands greater procedural protection even for property. See *South Carolina* v. *Regan*, 465 U. S. 367, 393 (1984) (O'CONNOR, J., concurring in judgment); *Phillips* v. *Commissioner*, 283 U. S. 589, 595–597 (1931) (Brandeis, J.). The serious constitutional problem arising out of a statute that, in these circumstances, permits an indefinite, perhaps permanent, deprivation of human liberty without any such protection is obvious.

The Government argues that, from a constitutional perspective, alien status itself can justify indefinite detention, and points to *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206 (1953), as support. That case involved a once lawfully admitted alien who left the United States, returned after a trip abroad, was refused admission, and was left on Ellis Island, indefinitely detained there because the Government could not find another country to accept him. The Court held that Mezei's detention did not violate the Constitution. *Id.*, at 215–216.

Although *Mezei*, like the present cases, involves indefinite detention, it differs from the present cases in a critical respect. As the Court emphasized, the alien's extended departure from the United States required him to seek entry into this country once again. His presence on Ellis Island did not count as entry into the United States. Hence, he was "treated," for constitutional purposes, "as if stopped at the border." *Id.*, at 213, 215. And that made all the difference.

The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law. See *Kaplan* v. *Tod*, 267 U. S. 228, 230 (1925) (despite nine years' presence in the United States, an "excluded" alien "was still in theory of law at the boundary line and had gained no foothold in the United States"); *Leng May Ma* v. *Barber*, 357 U. S. 185, 188–190 (1958) (alien "paroled" into the United States pending admissibility had not effected an "entry"). It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders. See *United States* v. *Verdugo-Urquidez*, 494 U. S. 259, 269 (1990) (Fifth Amendment's protections do not extend to aliens outside the territorial boundaries); *Johnson* v. *Eisentrager*, 339 U. S. 763, 784 (1950) (same). But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all "persons" within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent. See *Plyler* v. *Doe*, 457 U. S. 202, 210 (1982); *Mathews* v. *Diaz*, 426 U. S. 67, 77 (1976); *Kwong Hai Chew* v. *Colding*, 344 U. S. 590, 596–598, and n. 5 (1953); *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369 (1886); cf. *Mezei*, *supra*, at 212 ("[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law"). Indeed, this Court has held that the Due Process

Clause protects an alien subject to a final order of deportation, see *Wong Wing* v. *United States*, 163 U. S. 228, 238 (1896), though the nature of that protection may vary depending upon status and circumstance, see *Landon* v. *Plasencia*, 459 U. S. 21, 32–34 (1982); *Johnson*, *supra*, at 770.

In *Wong Wing*, *supra*, the Court held unconstitutional a statute that imposed a year of hard labor upon aliens subject to a final deportation order. That case concerned substantive protections for aliens who had been ordered removed, not procedural protections for aliens whose removability was being determined. Cf. *post*, at 704 (SCALIA, J., dissenting). The Court held that punitive measures could not be imposed upon aliens ordered removed because "all persons within the territory of the United States are entitled to the protection" of the Constitution. 163 U. S., at 238 (citing *Yick Wo*, *supra*, at 369 (holding that equal protection guarantee applies to Chinese aliens)); see also *Witkovich*, 353 U. S., at 199, 201 (construing statute which applied to aliens ordered deported in order to avoid substantive constitutional problems). And contrary to JUSTICE SCALIA's characterization, see *post*, at 703–705, in *Mezei* itself, both this Court's rejection of Mezei's challenge to the procedures by which he was deemed excludable and its rejection of his challenge to continued detention rested upon a basic territorial distinction. See *Mezei*, *supra*, at 215 (holding that Mezei's presence on Ellis Island was not "considered a landing" and did "not affec[t]" his legal or constitutional status (internal quotation marks omitted)).

In light of this critical distinction between *Mezei* and the present cases, *Mezei* does not offer the Government significant support, and we need not consider the aliens' claim that subsequent developments have undermined *Mezei*'s legal authority. See Brief for Petitioner in No. 99–7791, p. 23; Brief for Respondent in No. 00–38, pp. 16–17; Brief for Lawyers' Committee for Human Rights as *Amicus Curiae* in No. 00–38, pp. 15–20. Nor are we aware of any other authority that would support JUSTICE KENNEDY's limitation of

due process protection for removable aliens to freedom from detention that is arbitrary or capricious. See *post*, at 717–722 (dissenting opinion).

The Government also looks for support to cases holding that Congress has "plenary power" to create immigration law, and that the Judicial Branch must defer to Executive and Legislative Branch decisionmaking in that area. Brief for Respondents in No. 99–7791, at 17, 20 (citing *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 588–589 (1952)). But that power is subject to important constitutional limitations. See *INS* v. *Chadha*, 462 U. S. 919, 941–942 (1983) (Congress must choose "a constitutionally permissible means of implementing" that power); *The Chinese Exclusion Case*, 130 U. S. 581, 604 (1889) (congressional authority limited "by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations"). In these cases, we focus upon those limitations. In doing so, we nowhere deny the right of Congress to remove aliens, to subject them to supervision with conditions when released from detention, or to incarcerate them where appropriate for violations of those conditions. See 8 U. S. C. § 1231(a)(3) (1994 ed., Supp. V) (granting authority to Attorney General to prescribe regulations governing supervision of aliens not removed within 90 days); § 1253 (imposing penalties for failure to comply with release conditions). The question before us is not one of "'confer[ring] on those admitted the right to remain against the national will'" or "'sufferance of aliens'" who should be removed. *Post*, at 703 (SCALIA, J., dissenting) (emphasis deleted) (quoting *Mezei*, 345 U. S., at 222–223 (Jackson, J., dissenting)). Rather, the issue we address is whether aliens that the Government finds itself unable to remove are to be condemned to an indefinite term of imprisonment within the United States.

Nor do the cases before us require us to consider the political branches' authority to control entry into the United States. Hence we leave no "unprotected spot in the Na-

tion's armor." *Kwong Hai Chew*, 344 U. S., at 602. Neither do we consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security. The sole foreign policy consideration the Government mentions here is the concern lest courts interfere with "sensitive" repatriation negotiations. Brief for Respondents in No. 99–7791, at 21. But neither the Government nor the dissents explain how a habeas court's efforts to determine the likelihood of repatriation, if handled with appropriate sensitivity, could make a significant difference in this respect. See *infra*, at 699–700.

Finally, the Government argues that, whatever liberty interest the aliens possess, it is "greatly diminished" by their lack of a legal right to "liv[e] at large in this country." Brief for Respondents in No. 99–7791, at 47; see also *post*, at 703 (SCALIA, J., dissenting) (characterizing right at issue as "right to release into this country"). The choice, however, is not between imprisonment and the alien "living at large." Brief for Respondents in No. 99–7791, at 47. It is between imprisonment and supervision under release conditions that may not be violated. See *supra*, at 695 (citing 8 U. S. C. §§ 1231(a)(3), 1253 (1994 ed., Supp. V)); 8 CFR § 241.5 (2001) (establishing conditions of release after removal period). And, for the reasons we have set forth, we believe that an alien's liberty interest is, at the least, strong enough to raise a serious question as to whether, irrespective of the procedures used, cf. *post*, at 722–724 (KENNEDY, J., dissenting), the Constitution permits detention that is indefinite and potentially permanent.

B

Despite this constitutional problem, if "Congress has made its intent" in the statute "clear, 'we must give effect to that intent.'" *Miller* v. *French*, 530 U. S. 327, 336 (2000) (quoting *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195, 215 (1962)).

We cannot find here, however, any clear indication of congressional intent to grant the Attorney General the power to hold indefinitely in confinement an alien ordered removed. And that is so whether protecting the community from dangerous aliens is a primary or (as we believe) secondary statutory purpose. Cf. *post*, at 706, 708–709 (KENNEDY, J., dissenting). After all, the provision is part of a statute that has as its basic purpose effectuating an alien's removal. Why should we assume that Congress saw the alien's dangerousness as unrelated to this purpose?

The Government points to the statute's word "may." But while "may" suggests discretion, it does not necessarily suggest unlimited discretion. In that respect the word "may" is ambiguous. Indeed, if Congress had meant to authorize long-term detention of unremovable aliens, it certainly could have spoken in clearer terms. Cf. 8 U. S. C. § 1537(b)(2)(C) (1994 ed., Supp. V) ("If no country is willing to receive" a terrorist alien ordered removed, "the Attorney General may, notwithstanding any other provision of law, retain the alien in custody" and must review the detention determination every six months).

The Government points to similar related statutes that *require* detention of criminal aliens during removal proceedings and the removal period, and argues that these show that mandatory detention is the rule while discretionary release is the narrow exception. See Brief for Petitioners in No. 00–38, at 26–28 (citing 8 U. S. C. §§ 1226(c), 1231(a)(2)). But the statute before us applies not only to terrorists and criminals, but also to ordinary visa violators, see *supra*, at 691; and, more importantly, post-removal-period detention, unlike detention pending a determination of removability or during the subsequent 90-day removal period, has no obvious termination point.

The Government also points to the statute's history. That history catalogs a series of changes, from an initial period (before 1952) when lower courts had interpreted statutory

silence, Immigration Act of 1917, ch. 29, §§ 19, 20, 39 Stat. 889, 890, to mean that deportation-related detention must end within a reasonable time, *Spector* v. *Landon*, 209 F. 2d 481, 482 (CA9 1954) (collecting cases); *United States ex rel. Doukas* v. *Wiley*, 160 F. 2d 92, 95 (CA7 1947); *United States ex rel. Ross* v. *Wallis*, 279 F. 401, 403–404 (CA2 1922), to a period (from the early 1950's through the late 1980's) when the statutes permitted, but did not require, post-deportation-order detention for up to six months, Immigration and Nationality Act of 1952, § 242(c), 66 Stat. 210, 8 U. S. C. §§ 1252(c), (d) (1982 ed.); *Witkovich*, 353 U. S., at 198, to more recent statutes that have at times mandated and at other times permitted the post-deportation-order detention of aliens falling into certain categories such as aggravated felons, Anti-Drug Abuse Act of 1988, § 7343(a), 102 Stat. 4470, 8 U. S. C. § 1252(a)(2) (mandating detention); Immigration Act of 1990, § 504(a), 104 Stat. 5049–5050, 8 U. S. C. §§ 1252(a)(2)(A), (B) (permitting release under certain circumstances); Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, § 306(a)(4), 105 Stat. 1751, 8 U. S. C. § 1252(a)(2)(B) (same).

In early 1996, Congress explicitly expanded the group of aliens subject to mandatory detention, eliminating provisions that permitted release of criminal aliens who had at one time been lawfully admitted to the United States. Antiterrorism and Effective Death Penalty Act of 1996, § 439(c), 110 Stat. 1277. And later that year Congress enacted the present law, which liberalizes pre-existing law by shortening the removal period from six months to 90 days, mandates detention of certain criminal aliens during the removal proceedings and for the subsequent 90-day removal period, and adds the post-removal-period provision here at issue. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C, §§ 303, 305, 110 Stat. 3009–585, 3009–598 to 3009–599; 8 U. S. C. §§ 1226(c), 1231(a) (1994 ed., Supp. V).

We have found nothing in the history of these statutes that clearly demonstrates a congressional intent to authorize indefinite, perhaps permanent, detention. Consequently, interpreting the statute to avoid a serious constitutional threat, we conclude that, once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute. See 1 E. Coke, Institutes *70b *("Cessante ratione legis cessat ipse lex")* (the rationale of a legal rule no longer being applicable, that rule itself no longer applies).

IV

The Government seems to argue that, even under our interpretation of the statute, a federal habeas court would have to accept the Government's view about whether the implicit statutory limitation is satisfied in a particular case, conducting little or no independent review of the matter. In our view, that is not so. Whether a set of particular circumstances amounts to detention within, or beyond, a period reasonably necessary to secure removal is determinative of whether the detention is, or is not, pursuant to statutory authority. The basic federal habeas corpus statute grants the federal courts authority to answer that question. See 28 U. S. C. § 2241(c)(3) (granting courts authority to determine whether detention is "in violation of the . . . laws . . . of the United States"). In doing so the courts carry out what this Court has described as the "historic purpose of the writ," namely, "to relieve detention by executive authorities without judicial trial." *Brown* v. *Allen*, 344 U. S. 443, 533 (1953) (Jackson, J., concurring in result).

In answering that basic question, the habeas court must ask whether the detention in question exceeds a period reasonably necessary to secure removal. It should measure reasonableness primarily in terms of the statute's basic purpose, namely, assuring the alien's presence at the moment of removal. Thus, if removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no

longer authorized by statute. In that case, of course, the alien's release may and should be conditioned on any of the various forms of supervised release that are appropriate in the circumstances, and the alien may no doubt be returned to custody upon a violation of those conditions. See *supra*, at 695 (citing 8 U. S. C. §§ 1231(a)(3), 1253 (1994 ed., Supp. V); 8 CFR § 241.5 (2001)). And if removal is reasonably foreseeable, the habeas court should consider the risk of the alien's committing further crimes as a factor potentially justifying confinement within that reasonable removal period. See *supra*, at 690–692.

We recognize, as the Government points out, that review must take appropriate account of the greater immigration-related expertise of the Executive Branch, of the serious administrative needs and concerns inherent in the necessarily extensive INS efforts to enforce this complex statute, and the Nation's need to "speak with one voice" in immigration matters. Brief for Respondents in No. 99–7791, at 19. But we believe that courts can take appropriate account of such matters without abdicating their legal responsibility to review the lawfulness of an alien's continued detention.

Ordinary principles of judicial review in this area recognize primary Executive Branch responsibility. They counsel judges to give expert agencies decisionmaking leeway in matters that invoke their expertise. See *Pension Benefit Guaranty Corporation* v. *LTV Corp.*, 496 U. S. 633, 651–652 (1990). They recognize Executive Branch primacy in foreign policy matters. See *Container Corp. of America* v. *Franchise Tax Bd.*, 463 U. S. 159, 196 (1983). And they consequently require courts to listen with care when the Government's foreign policy judgments, including, for example, the status of repatriation negotiations, are at issue, and to grant the Government appropriate leeway when its judgments rest upon foreign policy expertise.

We realize that recognizing this necessary Executive leeway will often call for difficult judgments. In order to limit

the occasions when courts will need to make them, we think it practically necessary to recognize some presumptively reasonable period of detention. We have adopted similar presumptions in other contexts to guide lower court determinations. See *Cheff* v. *Schnackenberg*, 384 U. S. 373, 379–380 (1966) (plurality opinion) (adopting rule, based on definition of "petty offense" in United States Code, that right to jury trial extends to all cases in which sentence of six months or greater is imposed); *County of Riverside* v. *McLaughlin*, 500 U. S. 44, 56–58 (1991) (O'CONNOR, J.) (adopting presumption, based on lower court estimate of time needed to process arrestee, that 48-hour delay in probable-cause hearing after arrest is reasonable, hence constitutionally permissible).

While an argument can be made for confining any presumption to 90 days, we doubt that when Congress shortened the removal period to 90 days in 1996 it believed that all reasonably foreseeable removals could be accomplished in that time. We do have reason to believe, however, that Congress previously doubted the constitutionality of detention for more than six months. See Juris. Statement in *United States* v. *Witkovich*, O. T. 1956, No. 295, pp. 8–9. Consequently, for the sake of uniform administration in the federal courts, we recognize that period. After this 6-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing. And for detention to remain reasonable, as the period of prior post-removal confinement grows, what counts as the "reasonably foreseeable future" conversely would have to shrink. This 6-month presumption, of course, does not mean that every alien not removed must be released after six months. To the contrary, an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.

V

The Fifth Circuit held Zadvydas' continued detention lawful as long as "good faith efforts to effectuate . . . deportation continue" and Zadvydas failed to show that deportation will prove "impossible." 185 F. 3d, at 294, 297. But this standard would seem to require an alien seeking release to show the absence of *any* prospect of removal—no matter how unlikely or unforeseeable—which demands more than our reading of the statute can bear. The Ninth Circuit held that the Government was required to release Ma from detention because there was no reasonable likelihood of his removal in the foreseeable future. 208 F. 3d, at 831. But its conclusion may have rested solely upon the "absence" of an "extant or pending" repatriation agreement without giving due weight to the likelihood of successful future negotiations. See *id.*, at 831, and n. 30. Consequently, we vacate the judgments below and remand both cases for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

I join Part I of JUSTICE KENNEDY's dissent, which establishes the Attorney General's clear statutory authority to detain criminal aliens with no specified time limit. I write separately because I do not believe that, as JUSTICE KENNEDY suggests in Part II of his opinion, there may be some situations in which the courts can order release. I believe that in both *Zadvydas* v. *Davis*, No. 99–7791, and *Ashcroft* v. *Ma*, No. 00–38, a "careful description" of the substantive right claimed, *Reno* v. *Flores*, 507 U. S. 292, 302 (1993), suffices categorically to refute its existence. A criminal alien under final order of removal who allegedly will not be accepted by any other country in the reasonably foreseeable future claims a constitutional right of supervised release into the United States. This claim can be repackaged as freedom

from "physical restraint" or freedom from "indefinite detention," *ante*, at 689, 690, but it is at bottom a claimed right of release into this country by an individual who *concededly* has no legal right to be here. There is no such constitutional right.

Like a criminal alien under final order of removal, an inadmissible alien at the border has no right to be in the United States. *The Chinese Exclusion Case*, 130 U. S. 581, 603 (1889). In *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206 (1953), we upheld potentially indefinite detention of such an inadmissible alien whom the Government was unable to return anywhere else. We said that "we [did] not think that respondent's continued exclusion deprives him of any statutory or constitutional right." *Id.*, at 215. While four Members of the Court thought that Mezei deserved greater procedural protections (the Attorney General had refused to divulge any information as to why Mezei was being detained, *id.*, at 209), no Justice asserted that Mezei had a substantive constitutional right to release into this country. And Justice Jackson's dissent, joined by Justice Frankfurter, affirmatively asserted the opposite, with no contradiction from the Court: "Due process does not invest any alien with a right to enter the United States, *nor confer on those admitted the right to remain against the national will.* Nothing in the Constitution requires admission *or sufferance* of aliens hostile to our scheme of government." *Id.*, at 222–223 (emphasis added). Insofar as a claimed legal right to release into this country is concerned, an alien under final order of removal stands on an equal footing with an inadmissible alien at the threshold of entry: He has no such right.

The Court expressly declines to apply or overrule *Mezei*, *ante*, at 694, but attempts to distinguish it—or, I should rather say, to obscure it in a legal fog. First, the Court claims that "[t]he distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law." *Ante*, at 693. True enough, but only where that distinction makes perfect

sense: with regard to the question of what *procedures* are necessary to prevent entry, as opposed to what *procedures* are necessary to eject a person already in the United States. See, *e. g.*, *Landon* v. *Plasencia*, 459 U. S. 21, 32 (1982) ("Our cases have frequently suggested that a continuously present resident alien is entitled to a fair hearing *when threatened with deportation*" (emphasis added)). The Court's citation of *Wong Wing* v. *United States*, 163 U. S. 228 (1896), for the proposition that we have "held that the Due Process Clause protects an alien subject to a final order of deportation," *ante*, at 693–694, is arguably relevant. That case at least involved aliens under final order of deportation.* But all it held is that they could not be subjected to the punishment of hard labor without a judicial trial. I am sure they cannot be tortured, as well—but neither prohibition has anything to do with their right to be released into the United States. Nor does *Wong Wing* show that the rights of detained aliens subject to final order of deportation are different from the rights of aliens arrested and detained at the border—unless the Court believes that the detained alien in *Mezei could* have been set to hard labor.

Mezei thus stands unexplained and undistinguished by the Court's opinion. We are offered no justification why an alien under a valid and final order of removal—which has *totally extinguished* whatever right to presence in this country he possessed—has any greater due process right to be released into the country than an alien at the border seeking entry.

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*The Court also cites *Landon* v. *Plasencia*, 459 U. S. 21 (1982), as oblique support for the claim that the due process protection afforded aliens under final order of removal "may vary depending upon status and circumstance." *Ante*, at 694. But that case is entirely inapt because it did not involve an alien subject to a final order of deportation. The Court also cites *Johnson* v. *Eisentrager*, 339 U. S. 763, 770 (1950), *ante*, at 694, but that case is doubly irrelevant: because it dealt not with deportation but with the military's detention of enemy aliens outside the territorial jurisdiction of the United States, and because it rejected habeas corpus jurisdiction anyway.

Congress undoubtedly thought that both groups of aliens—inadmissible aliens at the threshold and criminal aliens under final order of removal—could be constitutionally detained on the same terms, since it provided the authority to detain both groups in the very same statutory provision, see 8 U. S. C. § 1231(a)(6). Because I believe *Mezei* controls these cases, and, like the Court, I also see no reason to reconsider *Mezei*, I find no constitutional impediment to the discretion Congress gave to the Attorney General. JUSTICE KENNEDY's dissent explains the clarity of the detention provision, and I see no obstacle to following the statute's plain meaning.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE joins, and with whom JUSTICE SCALIA and JUSTICE THOMAS join as to Part I, dissenting.

The Court says its duty is to avoid a constitutional question. It deems the duty performed by interpreting a statute in obvious disregard of congressional intent; curing the resulting gap by writing a statutory amendment of its own; committing its own grave constitutional error by arrogating to the Judicial Branch the power to summon high officers of the Executive to assess their progress in conducting some of the Nation's most sensitive negotiations with foreign powers; and then likely releasing into our general population at least hundreds of removable or inadmissible aliens who have been found by fair procedures to be flight risks, dangers to the community, or both. Far from avoiding a constitutional question, the Court's ruling causes systemic dislocation in the balance of powers, thus raising serious constitutional concerns not just for the cases at hand but for the Court's own view of its proper authority. Any supposed respect the Court seeks in not reaching the constitutional question is outweighed by the intrusive and erroneous exercise of its own powers. In the guise of judicial restraint the Court ought not to intrude upon the other branches. The constitutional question the statute presents, it must be acknowl-

edged, may be a significant one in some later case; but it ought not to drive us to an incorrect interpretation of the statute. The Court having reached the wrong result for the wrong reason, this respectful dissent is required.

I

The Immigration and Nationality Act (INA), 8 U. S. C. § 1101 *et seq.* (1994 ed. and Supp. V), is straightforward enough. It provides:

> "An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3)." 8 U. S. C. § 1231(a)(6) (1994 ed., Supp. V).

By this statute, Congress confers upon the Attorney General discretion to detain an alien ordered removed. It gives express authorization to detain "beyond the removal period." *Ibid.* The class of removed aliens detainable under the section includes aliens who were inadmissible and aliens subject to final orders of removal, provided they are a risk to the community or likely to flee. The issue to be determined is whether the authorization to detain beyond the removal period is subject to the implied, nontextual limitation that the detention be no longer than reasonably necessary to effect removal to another country. The majority invokes the canon of constitutional doubt to read that implied term into the statute. One can accept the premise that a substantial constitutional question is presented by the prospect of lengthy, even unending, detention in some instances; but the statutory construction the Court adopts should be rejected in any event. The interpretation has no basis in the lan-

guage or structure of the INA and in fact contradicts and defeats the purpose set forth in the express terms of the statutory text.

The Court, it is submitted, misunderstands the principle of constitutional avoidance which it seeks to invoke. The majority gives a brief bow to the rule that courts must respect the intention of Congress, *ante*, at 696, but then waltzes away from any analysis of the language, structure, or purpose of the statute. Its analysis is not consistent with our precedents explaining the limits of the constitutional doubt rule. The rule allows courts to choose among constructions which are "fairly possible," *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932), not to "'press statutory construction to the point of disingenuous evasion even to avoid a constitutional question,'" *Salinas* v. *United States*, 522 U. S. 52, 60 (1997) (quoting *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 57, n. 9 (1996)). Were a court to find two interpretations of equal plausibility, it should choose the construction that avoids confronting a constitutional question. The majority's reading of the statutory authorization to "detai[n] beyond the removal period," however, is not plausible. An interpretation which defeats the stated congressional purpose does not suffice to invoke the constitutional doubt rule, for it is "plainly contrary to the intent of Congress." *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 78 (1994). The majority announces it will reject the Government's argument "that the statute means what it literally says," *ante*, at 689, but then declines to offer any other acceptable textual interpretation. The majority does not demonstrate an ambiguity in the delegation of the detention power to the Attorney General. It simply amends the statute to impose a time limit tied to the progress of negotiations to effect the aliens' removal. The statute cannot be so construed. The requirement the majority reads into the law simply bears no relation to the text; and in fact it defeats the statutory purpose and design.

Other provisions in § 1231 itself do link the requirement of a reasonable time period to the removal process. See, *e. g.*, § 1231(c)(1)(A) (providing that an alien who arrives at a port of entry "shall be removed immediately on a vessel or aircraft" unless "it is impracticable" to do so "within a *reasonable* time" (emphasis added)); § 1231(c)(3)(A)(ii)(II) (requiring the "owner of a vessel or aircraft bringing an alien to the United States [to] pay the costs of detaining and maintaining the alien . . . for the period of time *reasonably necessary* for the owner to arrange for repatriation" (emphasis added)). That Congress chose to impose the limitation in these sections and not in § 1231(a)(6) is evidence of its intent to measure the detention period by other standards. When Congress has made express provisions for the contingency that repatriation might be difficult or prolonged in other portions of the statute, it should be presumed that its omission of the same contingency in the detention section was purposeful. Indeed, the reasonable time limits in the provisions just mentioned simply excuse the duty of early removal. They do not mandate release. An alien within one of these categories, say, a ship stowaway, would be subject as well to detention beyond the removal period under § 1231(a)(6), if the statute is read as written. Under the majority's view, however, it appears the alien must be released in six months even if presenting a real danger to the community.

The 6-month period invented by the Court, even when modified by its sliding standard of reasonableness for certain repatriation negotiations, see *ante*, at 701, makes the statutory purpose to protect the community ineffective. The risk to the community exists whether or not the repatriation negotiations have some end in sight; in fact, when the negotiations end, the risk may be greater. The authority to detain beyond the removal period is to protect the community, not to negotiate the aliens' return. The risk to the community survives repatriation negotiations. To a more limited, but still significant, extent, so does the concern with flight. It

is a fact of international diplomacy that governments and their policies change; and if repatriation efforts can be revived, the Attorney General has an interest in ensuring the alien can report so the removal process can begin again.

Congress, moreover, was well aware of the difficulties confronting aliens who are removable but who cannot be repatriated. It made special provisions allowing them to be employed, a privilege denied to other deportable aliens. See § 1231(a)(7) (providing an "alien [who] cannot be removed due to the refusal of all countries designated by the alien or under this section to receive the alien" still remains eligible for employment in the United States). Congress' decision to ameliorate the condition of aliens subject to a final order of removal who cannot be repatriated, but who need not be detained, illustrates a balance in the statutory design. Yet the Court renders the other side of the balance meaningless. The risk to the community posed by a removable alien is a function of a variety of circumstances, circumstances that do not diminish just because the alien cannot be deported within some foreseeable time. Those circumstances include the seriousness of the alien's past offenses, his or her efforts at rehabilitation, and some indication from the alien that, given the real prospect of detention, the alien will conform his or her conduct. This is the purpose for the periodic review of detention status provided for by the regulations. See 8 CFR § 241.4 (2001). The Court's amendment of the statute reads out of the provision the congressional decision that dangerousness alone is a sufficient basis for detention, see *ante*, at 699 (citing 1 E. Coke, Institutes *70b), and reads out as well any meaningful structure for supervised release.

The majority is correct to observe that in *United States* v. *Witkovich*, 353 U. S. 194 (1957), the Court "read significant limitations into" a statute, *ante*, at 689, but that does not permit us to avoid the proper reading of the enactment now before us. In *Witkovich*, the Court construed former § 1252(d), which required an alien under a final order of de-

portation "to give information under oath . . . as the Attorney General may deem fit and proper." 353 U. S., at 195. The Court held that although the plain language "appears to confer upon the Attorney General unbounded authority to require whatever information he deems desirable of aliens whose deportation has not been effected within six months," *id.*, at 199, the constitutional doubt this interpretation would raise meant the language would be construed as limited to the provision of information "reasonably calculated to keep the Attorney General advised regarding the continued availability for departure of aliens whose deportation is overdue," *id.*, at 202. In *Witkovich* the interpretation of the text was in aid of the statutory purpose; in the instant cases the interpretation nullifies the statutory purpose. Here the statute by its own terms permits the Attorney General to consider factors the Court now makes irrelevant.

The majority's unanchored interpretation ignores another indication that the Attorney General's detention discretion was not limited to this truncated period. Section 1231(a)(6) permits continued detention not only of removable aliens but also of inadmissible aliens, for instance those stopped at the border before entry. Congress provides for detention of both categories within the same statutory grant of authority. Accepting the majority's interpretation, then, there are two possibilities, neither of which is sustainable. On the one hand, it may be that the majority's rule applies to both categories of aliens, in which case we are asked to assume that Congress intended to restrict the discretion it could confer upon the Attorney General so that all inadmissible aliens must be allowed into our community within six months. On the other hand, the majority's logic might be that inadmissible and removable aliens can be treated differently. Yet it is not a plausible construction of § 1231(a)(6) to imply a time limit as to one class but not to another. The text does not admit of this possibility. As a result, it is difficult to see why "[a]liens who have not yet gained initial admission

to this country would present a very different question." *Ante*, at 682.

Congress' power to detain aliens in connection with removal or exclusion, the Court has said, is part of the Legislature's considerable authority over immigration matters. See, *e. g.*, *Wong Wing* v. *United States*, 163 U. S. 228, 235 (1896) ("Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation"). It is reasonable to assume, then, and it is the proper interpretation of the INA and § 1231(a)(6), that when Congress provided for detention "beyond the removal period," it exercised its considerable power over immigration and delegated to the Attorney General the discretion to detain inadmissible and other removable aliens for as long as they are determined to be either a flight risk or a danger to the Nation.

The majority's interpretation, moreover, defeats the very repatriation goal in which it professes such interest. The Court rushes to substitute a judicial judgment for the Executive's discretion and authority. As the Government represents to us, judicial orders requiring release of removable aliens, even on a temporary basis, have the potential to undermine the obvious necessity that the Nation speak with one voice on immigration and foreign affairs matters. Brief for Respondents in No. 99–7791, p. 49. The result of the Court's rule is that, by refusing to accept repatriation of their own nationals, other countries can effect the release of these individuals back into the American community. *Ibid.* If their own nationals are now at large in the United States, the nation of origin may ignore or disclaim responsibility to accept their return. *Ibid.* The interference with sensitive foreign relations becomes even more acute where hostility or tension characterizes the relationship, for other countries can use the fact of judicially mandated release to their strategic advantage, refusing the return of their nation-

als to force dangerous aliens upon us. One of the more alarming aspects of the Court's new venture into foreign affairs management is the suggestion that the district court can expand or contract the reasonable period of detention based on its own assessment of the course of negotiations with foreign powers. The Court says it will allow the Executive to perform its duties on its own for six months; after that, foreign relations go into judicially supervised receivership.

The cases which the Court relies upon to support the imposition of presumptions are inapposite. The rule announced in *Cheff* v. *Schnackenberg*, 384 U. S. 373 (1966)—"that sentences exceeding six months for criminal contempt may not be imposed by federal courts absent a jury trial"—was based on the definition of a "petty offense" that was still operable in the United States Code, and was proper "under the peculiar power of the federal courts to revise sentences in contempt cases." *Id.*, at 380. The majority can point to no similar statutory or judicial source for its authority to create its own time-based rule in these cases. It cites only an observation in a brief filed by the Government in *United States* v. *Witkovich*, O. T. 1956, No. 295, pp. 8–9, see *ante*, at 701, relying, in turn, on doubts expressed in a 1952 Senate Report concerning detention for longer than six months under an Act with standards different from, and far less precise than, those applicable here. In *County of Riverside* v. *McLaughlin*, 500 U. S. 44 (1991), our reasonableness presumption for delays of less than 48 hours between an arrest and a probable-cause hearing was, as the majority recognizes, *ante*, at 701, based on the "Court of Appeals' determination of the time required to complete those procedures." 500 U. S., at 57. Here, as far as we know, the 6-month period bears no particular relationship to how long it now takes to deport any group of aliens, or, for that matter, how long it took in the past to remove. Zadvydas' case itself demonstrates that the repatriation process may often take years to

negotiate, involving difficult issues of establishing citizenship and the like. See Brief for Petitioner in No. 99–7791, pp. 17–20.

It is to be expected that from time to time a foreign power will adopt a truculent stance with respect to the United States and other nations. Yet the Court by its time limit, or presumptive time limit, goes far to undercut the position of the Executive in repatriation negotiations, thus ill serving the interest of all foreign nationals of the country concerned. Law-abiding aliens might wish to return to their home country, for instance, but the strained relationship caused by the difficult repatriation talks might prove to be a substantial obstacle for these aliens as well.

In addition to weakening the hand of our Government, court ordered release cannot help but encourage dilatory and obstructive tactics by aliens who, emboldened by the Court's new rule, have good reason not to cooperate by making their own repatriation or transfer seem foreseeable. An alien ordered deported also has less incentive to cooperate or to facilitate expeditious removal when he has been released, even on a supervised basis, than does an alien held at an Immigration and Naturalization Service (INS) detention facility. Neither the alien nor his family would find any urgency in assisting with a petition to other countries to accept the alien back if the alien could simply remain in the United States indefinitely.

The risk to the community posed by the mandatory release of aliens who are dangerous or a flight risk is far from insubstantial; the motivation to protect the citizenry from aliens determined to be dangerous is central to the immigration power itself. The Government cites statistical studies showing high recidivism rates for released aliens. One Government Accounting Office study cited by Congress in floor debates on the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, put the figure as high as 77 percent. 142 Cong. Rec. 7972 (1996); Brief for Respondents in

No. 99–7791, at 27, n. 13. It seems evident a criminal record accumulated by an admitted alien during his or her time in the United States is likely to be a better indicator of risk than factors relied upon during the INS's initial decision to admit or exclude. Aliens ordered deported as the result of having committed a felony have proved to be dangerous.

Any suggestion that aliens who have completed prison terms no longer present a danger simply does not accord with the reality that a significant risk may still exist, as determined by the many factors set forth in the regulations. See 8 CFR § 241.4(f) (2001). Underworld and terrorist links are subtle and may be overseas, beyond our jurisdiction to impose felony charges. Furthermore, the majority's rationale seems to apply to an alien who flees prosecution or escapes from custody in some other country. The fact an alien can be deemed inadmissible because of fraud at the time of entry does not necessarily distinguish his or her case from an alien whose entry was legal. Consider, for example, a fugitive alien who enters by fraud or stealth and resides here for five years with significant ties to the community, though still presenting a danger; contrast him with an alien who entered lawfully but a month later committed an act making him removable. Why the Court's rationale should apply to the second alien but not the first is not apparent.

The majority cannot come to terms with these distinctions under its own rationale. The rule the majority creates permits consideration of nothing more than the reasonable foreseeability of removal. See *ante*, at 699–700. That standard is not only without sound basis in the statutory structure, but also is not susceptible to customary judicial inquiry. Cf. *INS* v. *Aguirre-Aguirre*, 526 U. S. 415, 425 (1999) ("The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions"). The majority does say that the release of terrorists or other "special circumstances" might justify "heightened deference to the judgments of the politi-

cal branches with respect to matters of national security." *Ante*, at 696. Here the Court appears to rely on an assessment of risk, but this is the very premise it finds inadequate to sustain the natural reading of the statute. The Court ought not to reject a rationale in order to deny power to the Attorney General and then invoke the same rationale to save its own analysis.

This rule of startling breadth invites potentially perverse results. Because other nations may refuse to admit aliens who have committed certain crimes—see, *e. g.*, Brief for Petitioner in No. 99–7791, at 19 ("Lithuanian law precludes granting of citizenship to persons who, before coming to Lithuania, have been sentenced in another state to imprisonment for a deliberate crime for which criminal liability is imposed by the laws of the Republic of Lithuania" (citations and internal quotation marks omitted))—often the aliens who have committed the most serious crimes will be those who may be released immediately under the majority's rule. An example is presented in the case of Saroeut Ourk, a Cambodian alien determined to be removable and held pending deportation. See *Ourk* v. *INS*, No. 00–35645 (CA9, Sept. 18, 2000), cert. pending, No. 00–987. Ourk was convicted of rape by use of drugs in conjunction with the kidnaping of a 13-year-old girl; after serving 18 months of his prison term, he was released on parole but was returned to custody twice more for parole violations. Pet. for Cert. in No. 00–987, pp. 4–5. When he was ordered deported and transferred to the custody of the INS, it is no surprise the INS determined he was both a flight risk and a danger to the community. Yet the Court of Appeals for the Ninth Circuit concluded, based on its earlier decision in *Kim Ho Ma* v. *Reno*, 208 F. 3d 815 (2000), that Ourk could no longer be held pending deportation, since removal to Cambodia was not reasonably foreseeable. App. to Pet. for Cert. in No. 00–987, pp. 3a–4a. See also *Phetsany* v. *INS*, No. 00–16286 (CA9, Sept. 18, 2000), cert. pending, No. 00–986 (requiring release of a native and

citizen of Laos convicted of attempted, premeditated murder); *Mounsaveng* v. *INS*, No. 00–15309 (CA9, Aug. 11, 2000), cert. pending, No. 00–751* (releasing a citizen of Laos convicted of rape of a 15-year-old girl and reckless endangerment for involvement in a fight in which gunshots were fired); *Lim* v. *Reno*, No. 99–36191 (CA9, Aug. 14, 2000), cert. pending, No. 00–777 (releasing a Cambodian convicted of rape and robbery); *Phuong Phuc Le* v. *INS*, No. 00–16095 (CA9, Sept. 18, 2000), cert. pending, No. 00–1001 (releasing a Vietnamese citizen convicted of voluntary manslaughter in a crime involving the attempted murder of two other persons). Today's result will ensure these dangerous individuals, and hundreds more like them, will remain free while the Executive Branch tries to secure their removal. By contrast, aliens who violate mere tourist visa requirements, *ante*, at 691, can in the typical case be held pending deportation on grounds that a minor offender is more likely to be removed. There is no reason to suppose Congress intended this odd result.

The majority's rule is not limited to aliens once lawfully admitted. Today's result may well mandate the release of those aliens who first gained entry illegally or by fraud, and, indeed, is broad enough to require even that inadmissible and excludable aliens detained at the border be set free in our community. In *Rosales-Garcia* v. *Holland*, 238 F. 3d 704, 725 (CA6 2001), for example, Rosales, a Cuban citizen, arrived in this country during the 1980 Mariel boatlift. *Id.*, at 707. Upon arrival in the United States, Rosales was released into the custody of a relative under the Attorney General's authority to parole illegal aliens, see 8 U. S. C. § 1182(d)(5)(A), and there he committed multiple crimes for which he was convicted and imprisoned. 238 F. 3d, at 707–708. While serving a sentence for burglary and grand larceny, Rosales escaped from prison, another of the offenses

*[REPORTER'S NOTE: See *post*, p. 943.]

for which he ultimately served time. *Id.*, at 708. The INS eventually revoked Rosales' immigration parole, ordered him deported, and held him pending deportation, subject to periodic consideration for parole under the Cuban Review Plan. See 8 CFR §212.12(g)(2) (2001). In reasoning remarkably similar to the majority's, the Court of Appeals for the Sixth Circuit held that the indefinite detention of Rosales violated Fifth Amendment due process rights, because "the government has offered . . . no credible proof that there is any possibility that Cuba may accept Rosales's return anytime in the foreseeable future." 238 F. 3d, at 725. This result—that Mariel Cubans and other illegal, inadmissible aliens will be released notwithstanding their criminal history and obvious flight risk—would seem a necessary consequence of the majority's construction of the statute.

The majority's confidence that the Judiciary will handle these matters "with appropriate sensitivity," *ante*, at 696, 700, allows no meaningful category to confine or explain its own sweeping rule, provides no justification for wresting this sovereign power away from the political branches in the first place, and has no support in judicially manageable standards for deciding the foreseeability of removal.

It is curious that the majority would approve of continued detention beyond the 90-day period, or, for that matter, during the 90-day period, where deportation is not reasonably foreseeable. If the INS cannot detain an alien because he is dangerous, it would seem irrelevant to the Constitution or to the majority's presumption that the INS has detained the alien for only a little while. The reason detention is permitted at all is that a removable alien does not have the same liberty interest as a citizen does. The Court cannot bring itself to acknowledge this established proposition. Likewise, it is far from evident under the majority's theory why the INS can condition and supervise the release of aliens who are not removable in the reasonably foreseeable future, or why "the alien may no doubt be returned to custody upon

a violation of those conditions." *Ante*, at 700. It is true that threat of revocation of supervised release is necessary to make the supervised release itself effective, a fact even counsel for Zadvydas acknowledged. Brief for Petitioner in No. 99–7791, at 20–21. If that is so, however, the whole foundation for the Court's position collapses.

The Court today assumes a role in foreign relations which is unprecedented, unfortunate, and unwise. Its misstep results in part from a misunderstanding of the liberty interests these aliens retain, an issue next to be discussed.

II

The aliens' claims are substantial; their plight is real. They face continued detention, perhaps for life, unless it is shown they no longer present a flight risk or a danger to the community. In a later case the specific circumstances of a detention may present a substantial constitutional question. That is not a reason, however, for framing a rule which ignores the law governing alien status.

As persons within our jurisdiction, the aliens are entitled to the protection of the Due Process Clause. Liberty under the Due Process Clause includes protection against unlawful or arbitrary personal restraint or detention. The liberty rights of the aliens before us here are subject to limitations and conditions not applicable to citizens, however. See, *e. g.*, *Mathews* v. *Diaz*, 426 U. S. 67, 79–80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens"). No party to this proceeding contests the initial premise that the aliens have been determined to be removable after a fair hearing under lawful and proper procedures. Section 1229a sets forth the proceedings required for deciding the inadmissibility or removability of an alien, including a hearing before an immigration judge, at which the INS carries "the burden of establishing by clear and convincing evidence that . . . the alien is deportable." 8

U. S. C. § 1229a(c)(3)(A); see also *Berenyi* v. *District Director, INS*, 385 U. S. 630, 636 (1967) ("When the Government seeks to . . . deport a resident alien and send him from our shores, it carries the heavy burden of proving its case by clear, unequivocal, and convincing evidence" (internal quotation marks and footnotes omitted)). Aliens ordered removed pursuant to these procedures are given notice of their right to appeal the decision, 8 U. S. C. § 1229a(c)(4), may move the immigration judge to reconsider, § 1229a(c)(5), can seek discretionary cancellation of removal, § 1229b, and can obtain habeas review of the Attorney General's decision not to consider waiver of deportation. See *INS* v. *St. Cyr, ante*, at 314. As a result, aliens like Zadvydas and Ma do not arrive at their removable status without thorough, substantial procedural safeguards.

The majority likely is correct to say that the distinction between an alien who entered the United States, as these aliens did, and one who has not, "runs throughout immigration law." *Ante*, at 693. The distinction is not so clear as it might seem, however, and I doubt it will suffice to confine the rationale adopted by the majority. The case which often comes to mind when one tests the distinction is *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206 (1953), where the Court considered the situation of an alien denied entry and detained on Ellis Island. The detention had no foreseeable end, for though Mezei was inadmissible to the United States it seemed no other country would have him. *Id.*, at 209. The case presented a line-drawing problem, asking whether the alien was in our country; or whether his situation was the same as if he were still on foreign shores; or whether he fell in a legal category somewhere in between, though if this were true, it still would not be clear how to resolve the case. The Court held the alien had no right to a hearing to secure his release. *Id.*, at 212–213. (Approximately 17 months after this Court denied Mezei relief, the Attorney General released him on parole. It appears Mezei

never returned to INS custody, though he was not admitted to the United States as a citizen or lawful permanent resident. See Weisselberg, The Exclusion and Detention of Aliens: Lessons From the Lives of Ellen Knauff and Ignatz Mezei, 143 U. Pa. L. Rev. 933, 979–984 (1995).)

Here the majority says the earlier presence of these aliens in the United States distinguishes the cases from *Mezei.* For reasons given here it is submitted the majority is incorrect in its major conclusions in all events, so even if it were assumed these aliens are in a class with more rights than *Mezei*, it makes no difference. For purposes of this dissent it is not necessary to rely upon *Mezei.*

That said, it must be made clear these aliens are in a position far different from aliens with a lawful right to remain here. They are removable, and their rights must be defined in accordance with that status. The due process analysis must begin with a "careful description of the asserted right." *Reno* v. *Flores,* 507 U. S. 292, 302 (1993). We have "long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Landon* v. *Plasencia,* 459 U. S. 21, 32 (1982). The same is true for those aliens like Zadvydas and Ma, who face a final order of removal. When an alien is removable, he or she has no right under the basic immigration laws to remain in this country. The removal orders reflect the determination that the aliens' ties to this community are insufficient to justify their continued presence in the United States. An alien's admission to this country is conditioned upon compliance with our laws, and removal is the consequence of a breach of that understanding.

It is true the Court has accorded more procedural protections to those aliens admitted to the country than those stopped at the border, observing that "a continuously present alien is entitled to a fair hearing when threatened with

deportation." *Ibid.*; *Mezei*, *supra*, at 212 ("[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. . . . But an alien on the threshold of initial entry stands on a different footing: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned'" (quoting *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537, 544 (1950))). Removable and excludable aliens are situated differently before an order of removal is entered; the removable alien, by virtue of his continued presence here, possesses an interest in remaining, while the excludable alien seeks only the privilege of entry.

Still, both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious. Where detention is incident to removal, the detention cannot be justified as punishment nor can the confinement or its conditions be designed in order to punish. See *Wong Wing* v. *United States*, 163 U. S. 228 (1896). This accords with international views on detention of refugees and asylum seekers. See Report of the United Nations Working Group on Arbitrary Detention, U. N. Doc. E/CN.4/2000/4 (Dec. 28, 1999); United Nations High Commissioner for Refugees, Guidelines on Applicable Criteria and Standards Relating to the Detention on Asylum-Seekers (Feb. 10, 1999). It is neither arbitrary nor capricious to detain the aliens when necessary to avoid the risk of flight or danger to the community.

Whether a due process right is denied when removable aliens who are flight risks or dangers to the community are detained turns, then, not on the substantive right to be free, but on whether there are adequate procedures to review their cases, allowing persons once subject to detention to show that through rehabilitation, new appreciation of their responsibilities, or under other standards, they no longer present special risks or danger if put at large. The proce-

dures to determine and to review the status-required detention go far toward this objective.

By regulations, promulgated after notice and comment, the Attorney General has given structure to the discretion delegated by the INA in order to ensure fairness and regularity in INS detention decisions. First, the INS provides for an initial postcustody review, before the expiration of the 90-day removal period, at which a district director conducts a record review. 8 CFR § 241.4 (2001). The alien is entitled to present any relevant information in support of release, and the district director has the discretion to interview the alien for a personal evaluation. § 241.4(h)(1). At the end of the 90-day period, the alien, if held in custody, is transferred to a postorder detention unit at INS headquarters, which in the ordinary course will conduct an initial custody review within three months of the transfer. § 241.4(k)(2)(ii). If the INS determines the alien should remain in detention, a two-member panel of INS officers interviews the alien and makes a recommendation to INS headquarters. §§ 241.4(i)(1)–(3). The regulations provide an extensive, nonexhaustive list of factors that should be considered in the recommendation to release or further detain. Those include: "[t]he nature and number of disciplinary infractions"; "the detainee's criminal conduct and criminal convictions, including consideration of the nature and severity of the alien's convictions, sentences imposed and time actually served, probation and criminal parole history, evidence of recidivism, and other criminal history"; "psychiatric and psychological reports pertaining to the detainee's mental health"; "[e]vidence of rehabilitation"; "[f]avorable factors, including ties to the United States such as the number of close relatives"; "[p]rior immigration violations and history"; "[t]he likelihood that the alien is a significant flight risk or may abscond to avoid removal, including history of escapes"; and any other probative information. § 241.4(f). Another review must occur within one year, with mandatory evaluations each year thereafter; if the alien re-

quests, the INS has the discretion to grant more frequent reviews. § 241.4(k)(2)(iii). The INS must provide the alien 30-days advance, written notice of custody reviews; and it must afford the alien an opportunity to submit any relevant materials for consideration. § 241.4(i)(3)(ii). The alien may be assisted by a representative of his choice during the review, §§ 241.4(i)(3)(i), (ii), and the INS must provide the alien with a copy of its decision, including a brief statement of the reasons for any continued detention, § 241.4(d).

In this context the proper analysis can be informed by our cases involving parole-eligibility or parole-revocation determinations. In *Morrissey* v. *Brewer*, 408 U. S. 471 (1972), for example, we held some amount of process was due an individual whose parole was revoked, for "the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty." *Id.*, at 482; see also *Board of Pardons* v. *Allen*, 482 U. S. 369 (1987). We rejected in *Morrissey* the suggestion that the State could justify parole revocation "without some informal procedural guarantees," 408 U. S., at 483, but "[g]iven the previous conviction and the proper imposition of conditions," we recognized that "the State has an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial," *ibid.* We held the review process need not include a judicial officer or formal court proceeding, but could be conducted by a neutral administrative official. *Id.*, at 486.

While the majority expresses some concern that the regulations place the burden on the alien to show he is no longer dangerous, that question could be adjudicated in a later case raising the issue. It should be noted the procedural protection here is real, not illusory; and the criteria for obtaining release are far from insurmountable. Statistics show that between February 1999 and mid-November 2000 some 6,200 aliens were provided custody reviews before expiration of the 90-day removal period, and of those aliens about 3,380

were released. 65 Fed. Reg. 80285 (2000); Reply Brief for Petitioners in No. 00–38, p. 15. As a result, although the alien carries the burden to prove detention is no longer justified, there is no showing this is an unreasonable burden.

Like the parolee in *Morrissey*, who was aware of the conditions of his release, the aliens in the instant cases have notice, constructive or actual, that the INA imposes as a consequence of the commission of certain crimes not only deportation but also the possibility of continued detention in cases where deportation is not immediately feasible. And like the prisoner in *Board of Pardons* v. *Allen*, who sought federal-court review of the discretionary decision denying him parole eligibility, removable aliens held pending deportation have a due process liberty right to have the INS conduct the review procedures in place. See 482 U. S., at 381. Were the INS, in an arbitrary or categorical manner, to deny an alien access to the administrative processes in place to review continued detention, habeas jurisdiction would lie to redress the due process violation caused by the denial of the mandated procedures under 8 CFR §241.4 (2001).

This is not the posture of the instant cases, however. Neither Zadvydas nor Ma argues that the Attorney General has applied the procedures in an improper manner; they challenge only the Attorney General's authority to detain at all where removal is no longer foreseeable. The Government has conceded that habeas jurisdiction is available under 28 U. S. C. §2241 to review an alien's challenge to detention following entry of a final order of deportation, Brief for Respondents in No. 99–7791, at 9–10, n. 7; Tr. of Oral Arg. 59, although it does not detail what the nature of the habeas review would be. As a result, we need not decide today whether, and to what extent, a habeas court could review the Attorney General's determination that a detained alien continues to be dangerous or a flight risk. Given the undeniable deprivation of liberty caused by the detention, there might be substantial questions concerning the severity nec-

essary for there to be a community risk; the adequacy of judicial review in specific cases where it is alleged there is no justification for concluding an alien is dangerous or a flight risk; and other issues. These matters are not presented to us here.

In all events, if judicial review is to be available, the inquiry required by the majority focuses on the wrong factors. Concepts of flight risk or future dangerousness are manageable legal categories. See, *e. g.*, *Kansas* v. *Hendricks*, 521 U. S. 346 (1997); *Foucha* v. *Louisiana*, 504 U. S. 71 (1992). The majority instead would have the Judiciary review the status of repatriation negotiations, which, one would have thought, are the paradigmatic examples of nonjusticiable inquiry. See *INS* v. *Aguirre-Aguirre*, 526 U. S., at 425. The inquiry would require the Executive Branch to surrender its primacy in foreign affairs and submit reports to the courts respecting its ongoing negotiations in the international sphere. High officials of the Department of State could be called on to testify as to the status of these negotiations. The Court finds this to be a more manageable, more appropriate role for the Judiciary than to review a single, discrete case deciding whether there were fair procedures and adequate judicial safeguards to determine whether an alien is dangerous to the community so that long-term detention is justified. The Court's rule is a serious misconception of the proper judicial function, and it is not what Congress enacted.

For these reasons, the Court should reverse the judgment of the Court of Appeals for the Ninth Circuit and affirm the judgment of the Court of Appeals for the Fifth Circuit. I dissent.

Reporter's Note

The next page is purposely numbered 901. The numbers between 725 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR JUNE 11 THROUGH SEPTEMBER 25, 2001

JUNE 11, 2001

Certiorari Granted—Vacated and Remanded

No. 00–1479. ROBERTSON *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Penry* v. *Johnson*, 532 U. S. 782 (2001). Reported below: 234 F. 3d 890.

Certiorari Dismissed

No. 00–9281. SUMTER *v.* SAYBOLT, INC., ET AL. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 248 F. 3d 1131.

Miscellaneous Orders

No. D–2245. IN RE DISBARMENT OF GREEN. Disbarment entered. [For earlier order herein, see 531 U. S. 1139.]

No. 00M95. JOHNSON *v.* CLEVELAND BOARD OF EDUCATION; and

No. 00M96. DUNIGAN *v.* FEDERAL BUREAU OF INVESTIGATION, CRIMINAL INVESTIGATIVE DIVISION. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 00–8501. BAKER *v.* THOMPSON, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 6th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [532 U. S. 955] denied.

No. 00–10029. IN RE ROBINSON; and

No. 00–10104. IN RE CROSBY. Petitions for writs of habeas corpus denied.

No. 00–9305. IN RE KASKA;

No. 00–9357. IN RE ROBINSON;

No. 00–9359. IN RE RICHARDSON; and
No. 00–9819. IN RE HARRIS. Petitions for writs of mandamus denied.

No. 00–9390. IN RE BOWEN; and
No. 00–9392. IN RE REED. Petitions for writs of mandamus and/or prohibition denied.

Certiorari Denied

No. 00–896. O'BRIEN *v.* UNITED STATES; and
No. 00–997. SCHMIDT ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 229 F. 3d 1148.

No. 00–1277. ILLINOIS STATE UNIVERSITY ET AL. *v.* VARNER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 226 F. 3d 927.

No. 00–1412. RAYMOND, DBA MORNINGSTAR CONSULTANTS, ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 228 F. 3d 804.

No. 00–1459. SOUTHWEST MARINE, INC. *v.* SAN DIEGO BAY KEEPER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 236 F. 3d 985.

No. 00–1528. KAYNE ET AL. *v.* MTC ELECTRONIC TECHNOLOGIES CO., LTD., ET AL. C. A. 2d Cir. Certiorari denied.

No. 00–1530. KIRCHMANN *v.* LAKE ELSINORE UNIFIED SCHOOL DISTRICT. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 83 Cal. App. 4th 1098, 100 Cal. Rptr. 2d 289.

No. 00–1536. WILLIAMS ET AL. *v.* GLEASON ET AL. Ct. App. Tex., 14th Dist. Certiorari denied. Reported below: 26 S. W. 3d 54.

No. 00–1540. JORDAN *v.* TOYOTA MOTOR CREDIT CORP. C. A. 7th Cir. Certiorari denied. Reported below: 236 F. 3d 866.

No. 00–1544. TRINITY MARINE GROUP, INC., ET AL. *v.* E. N. BISSO & SON, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 245 F. 3d 791.

No. 00–1554. RHEM, PERSONAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF RHEM, DECEASED, ET AL. *v.*

BRITAIN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 243 F. 3d 540.

No. 00–1566. LEXMARK INTERNATIONAL, INC. *v.* SNOWDEN. C. A. 6th Cir. Certiorari denied. Reported below: 237 F. 3d 620.

No. 00–1570. WOZNIAK *v.* CONRY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 236 F. 3d 888.

No. 00–1580. GOURLEY ET UX. *v.* USERY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 242 F. 3d 378.

No. 00–1585. MARKS *v.* CARMODY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 234 F. 3d 1006.

No. 00–1611. RICHARDSON *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 248 F. 3d 1139.

No. 00–1615. DIXIE DISTRIBUTING CO. ET AL. *v.* CARTER-JONES LUMBER CO. C. A. 6th Cir. Certiorari denied. Reported below: 237 F. 3d 745.

No. 00–1627. BARON *v.* CITY OF BROADVIEW HEIGHTS. Ct. App. Ohio, Cuyahoga County. Certiorari denied. Reported below: 139 Ohio App. 3d 729, 745 N. E. 2d 516.

No. 00–1657. ASKEW *v.* UNION PACIFIC RAILROAD CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 248 F. 3d 1156.

No. 00–1664. COOK INLET PROCESSORS, INC. *v.* BAKER, AS CLASS REPRESENTATIVE OF THE MANDATORY PUNITIVE DAMAGES CLASS, AND ALL PERSONS SIMILARLY SITUATED, ET AL.; and

No. 00–1672. NAUTILUS MARINE ENTERPRISES, INC. *v.* BAKER, AS CLASS REPRESENTATIVE OF THE MANDATORY PUNITIVE DAMAGES CLASS, AND ALL PERSONS SIMILARLY SITUATED, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 246 F. 3d 673.

No. 00–1668. GARCIA *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 00–1677. LIDAS, INC., ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 238 F. 3d 1076.

No. 00–7926. PANTOJA-NUNEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 229 F. 3d 1169.

No. 00–7981. HOGAN *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 00–8148. HARRISON, AKA WILLIAMS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 00–8471. LANIER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 238 F. 3d 425.

No. 00–8628. BAYLY *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 00–8734. COX *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 556 Pa. 368, 728 A. 2d 923.

No. 00–8804. ARROYO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 234 F. 3d 711.

No. 00–8901. PACHECO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 225 F. 3d 148.

No. 00–8911. TREVINO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 244 F. 3d 134.

No. 00–8920. MCGHEE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 211 F. 3d 597.

No. 00–9116. BURNS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 229 F. 3d 1159.

No. 00–9256. TREESH *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 90 Ohio St. 3d 460, 739 N. E. 2d 749.

No. 00–9279. KHAN *v.* PORTUONDO, SUPERINTENDENT, SHAWANGUNK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 242 F. 3d 365.

No. 00–9282. BREWER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 00–9284. ANDERSON *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 00–9295. PRUITT *v.* YUKINS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 00–9296. ROBERT C. ET UX. *v.* NEBRASKA. Ct. App. Neb. Certiorari denied.

No. 00–9298. CLARK *v.* RAMIREZ-PALMER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 00–9301. MYERS *v.* UCLA EXTENSION ET AL. C. A. 9th Cir. Certiorari denied.

No. 00–9302. LAY *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 00–9306. BRUCE *v.* GOMEZ, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 00–9311. ABDUS-SABIR *v.* KNOX ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 821 So. 2d 254.

No. 00–9314. WILLIAMS *v.* SCOTT, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL. C. A. 5th Cir. Certiorari denied.

No. 00–9317. BREWER *v.* BRILEY (two judgments). C. A. 7th Cir. Certiorari denied.

No. 00–9318. ANDERSON *v.* MORTON, SUPERINTENDENT, TRENTON STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 00–9321. PANIZZON *v.* TERHUNE, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 00–9323. JOHNSON *v.* KERNAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 00–9331. ARRINGTON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 00–9336. AUSTIN *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 247 F. 3d 240.

No. 00–9337. BROWN *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–9340. ANDERSON *v.* DISTRICT OF COLUMBIA ET AL. C. A. D. C. Cir. Certiorari denied.

No. 00–9342. JOHNSON *v.* WELBORN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 00–9345. DANIELS *v.* SMITH, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 00–9347. THOMAS *v.* WELBORN, CLERK, 19TH JUDICIAL DISTRICT COURT, LOUISIANA. C. A. 5th Cir. Certiorari denied. Reported below: 244 F. 3d 136.

No. 00–9350. WASHINGTON *v.* ARIZONA. Super. Ct. Ariz., Yuma County. Certiorari denied.

No. 00–9354. PARHAM *v.* YOUNG, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 243 F. 3d 539.

No. 00–9355. MCLAUGHLIN *v.* LAMBERT, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied.

No. 00–9358. RICHARDSON *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 00–9360. BARNETT *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 00–9363. DICKENS *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied.

No. 00–9365. BAYRAMOGLU *v.* HAMLET, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 00–9366. GOVAN *v.* BOSTON UNIVERSITY ET AL. C. A. 1st Cir. Certiorari denied.

No. 00–9367. HARRINGTON *v.* JACKSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 248 F. 3d 1148.

No. 00–9370. HILL *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied.

No. 00–9371. GLADSTONE *v.* HASTINGS ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–9378. GONZALEZ *v.* TERHUNE, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 00–9383. MENDEZ-HINOJOSA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 239 F. 3d 369.

No. 00–9388. BRUTON *v.* MEYERS ET AL. C. A. 3d Cir. Certiorari denied.

No. 00–9389. JOHNSON *v.* FAIRMAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 00–9391. BRADLEY *v.* ROE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 00–9397. COSEY *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 779 So. 2d 675.

No. 00–9454. BOYER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 00–9526. HOUSTON *v.* BURDETTE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 230 F. 3d 1358.

No. 00–9534. JACKSON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 810 So. 2d 812.

No. 00–9535. HOPKINS *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 00–9575. GILMORE *v.* VAUGHN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 00–9597. STANDING ROCK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 00–9624. LONG *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 00–9629. LICCIARDI *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 00–9690. RICO AGUILERA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 248 F. 3d 1166.

No. 00–9699. SANTOS *v.* MASSANARI, ACTING COMMISSIONER OF SOCIAL SECURITY. C. A. 9th Cir. Certiorari denied. Reported below: 238 F. 3d 430.

No. 00–9702. ORTIZ-CAMERON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 00–9704. HARRIS *v.* UNITED STATES; and
No. 00–9745. GAINES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 238 F. 3d 777.

No. 00–9706. HARVEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 242 F. 3d 377.

No. 00–9731. ANDINO *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 786 So. 2d 1183.

No. 00–9734. ENIS *v.* SCHOMIG, WARDEN. Sup. Ct. Ill. Certiorari denied. Reported below: 194 Ill. 2d 361, 743 N. E. 2d 1.

No. 00–9743. HISHAW *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 235 F. 3d 565.

No. 00–9764. MEDELLIN-BARBOZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 741.

No. 00–9767. ROSAS LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 235 F. 3d 1339.

No. 00–9775. RIGGINS *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 238 F. 3d 954.

No. 00–9778. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 415.

No. 00–9780. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 243 F. 3d 542.

No. 00–9783. LUVIANO-GONZALEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 742.

No. 00–9785. JONES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 00–9786. PEAK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 248 F. 3d 1179.

No. 00–9788. SALAZAR-DOZAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 253 F. 3d 702.

No. 00–9789. SCOTT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 738.

No. 00–9792. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 248 F. 3d 1183.

No. 00–9793. TORRES-MONTALVO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 00–9794. THOMAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 248 F. 3d 1175.

No. 00–9798. BRACMORT *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 760 A. 2d 164.

No. 00–9806. GARCIA-CRUZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 741.

No. 00–9808. GALANTE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 248 F. 3d 1182.

No. 00–9812. ROULHAC *v.* BASKERVILLE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 243 F. 3d 540.

No. 00–9827. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 00–9832. FLORES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 00–9836. GALLMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 232 F. 3d 891.

No. 00–9838. REMINGTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 243 F. 3d 544.

No. 00–9840. SANTOS-JIMENEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 742.

No. 00–9841. JUAREZ-ARRELLANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 742.

No. 00–9842. MARTINEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 248 F. 3d 1182.

No. 00–9845. CRUZ-BOLANOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 742.

No. 00–9846. DOMINGUEZ-TREVINO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 742.

No. 00–9847. SCALES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 243 F. 3d 544.

No. 00–9857. AYENI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 254 F. 3d 1079.

No. 00–9859. ARSHAD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 239 F. 3d 276.

No. 00–9860. AVILA-RAMOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 741.

No. 00–9862. MALADY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 00–9863. PADRO BURGOS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 239 F. 3d 72.

No. 00–9866. AGUILAR-RODRIGUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 248 F. 3d 1173.

No. 00–9867. RIVERA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 00–9870. ADDERLY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 00–9875. DANIEL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 230 F. 3d 1354.

No. 00–9880. EKOP *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 209 F. 3d 723.

No. 00–9884. GALBERT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 248 F. 3d 1144.

No. 00–9886. GONZALEZ-MEDINA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 741.

No. 00–9887. HUERTA-VALLIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 742.

No. 00–9889. GENTILE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 248 F. 3d 1178.

No. 00–9896. MATHISON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 00–9904. JAIMES-JAIMES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 741.

No. 00–9905. LAWSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 248 F. 3d 1143.

No. 00–9907. ALANIZ, AKA ALANEZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 235 F. 3d 386.

No. 00–9911. ACOSTA-ALVAREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 742.

No. 00–9950. HILL *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 134 Md. App. 709.

No. 00–1375. CONSUL GENERAL FOR THE REPUBLIC OF POLAND IN CHICAGO ET AL. *v.* ILLINOIS ET AL. Sup. Ct. Ill. Motion of petitioners to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 193 Ill. 2d 395, 739 N. E. 2d 423.

No. 00–1527. EVANNS *v.* AT&T CORP. ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 229 F. 3d 837 and 242 F. 3d 381.

No. 00–1564. MEHLER ET AL. *v.* TERMINIX INTERNATIONAL CO. C. A. 2d Cir. Motion of Robert A. Hillman et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 205 F. 3d 44.

No. 00–1594. EDDINS *v.* SUMMERS, ATTORNEY GENERAL OF TENNESSEE, ET AL. C. A. 6th Cir. Certiorari before judgment denied.

No. 00–1651. NORTHERN LIGHTS CLUB ET AL. *v.* NORTHERN LIGHT TECHNOLOGY, INC. C. A. 1st Cir. Motion of petitioners

for leave to include CD–ROM submission in appendix to the petition denied. Certiorari denied. Reported below: 236 F. 3d 57.

No. 00–9598. WALDRON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 248 F. 3d 1175.

Rehearing Denied

No. 00–152. LUJAN, LABOR COMMISSIONER OF CALIFORNIA, ET AL. *v.* G & G FIRE SPRINKLERS, INC., 532 U. S. 189;

No. 00–866. CLARK COUNTY SCHOOL DISTRICT *v.* BREEDEN, 532 U. S. 268;

No. 00–1388. TELEPO *v.* PALMER TOWNSHIP ET AL., 532 U. S. 1008;

No. 00–7538. SHULL *v.* BEXAR COUNTY ET AL., 532 U. S. 975;

No. 00–8006. BANNISTER *v.* CAIN, WARDEN, 532 U. S. 930;

No. 00–8273. GUILLORY *v.* CAIN, WARDEN, ET AL., 532 U. S. 960;

No. 00–8408. FUGETT *v.* MACK, WARDEN, 532 U. S. 934;

No. 00–8566. DeTEMPLE *v.* HEDRICK ET AL., 532 U. S. 979;

No. 00–8567. DeTEMPLE *v.* ALLSTATE INSURANCE CO., 532 U. S. 979;

No. 00–8709. SWEED *v.* TEXAS, 532 U. S. 1011;

No. 00–8887. HOOPER *v.* UNITED STATES, 532 U. S. 985;

No. 00–8929. STULL *v.* UNITED STATES, 532 U. S. 986;

No. 00–9182. HURLEY *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 532 U. S. 1013; and

No. 00–9283. GIBBONS *v.* MENIFEE, WARDEN, 532 U. S. 1030. Petitions for rehearing denied.

No. 00–8584. RASTEN *v.* WELLS FARGO SECURITY, 532 U. S. 1003. Petition for rehearing denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

JUNE 13, 2001

Certiorari Denied

No. 00–10526 (00A1082). SCOTT *v.* MITCHELL, WARDEN. C. A. 6th Cir. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied. Reported below: 250 F. 3d 1011.

No. 00–10582 (00A1095). SCOTT *v.* OHIO. Sup. Ct. Ohio. Application for stay of execution of sentence of death, presented to

JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied. Reported below: 92 Ohio St. 3d 1419, 748 N. E. 2d 551.

JUNE 18, 2001

Certiorari Granted—Vacated and Remanded

No. 99–1872. UNITED STATES *v.* AHUMADA-AGUILAR. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Tuan Anh Nguyen* v. *INS*, *ante*, p. 53. Reported below: 189 F. 3d 1121.

No. 00–525. ACKER *v.* UNITED STATES. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Kyllo* v. *United States*, *ante*, p. 27. Reported below: 219 F. 3d 602.

No. 00–963. ASHCROFT, ATTORNEY GENERAL *v.* LAKE. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Tuan Anh Nguyen* v. *INS*, *ante*, p. 53. Reported below: 226 F. 3d 141.

No. 00–1194. CAMPBELL ET AL. *v.* ST. TAMMANY'S SCHOOL BOARD ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Good News Club* v. *Milford Central School*, *ante*, p. 98. Reported below: 206 F. 3d 482.

No. 00–1428. RAPANOS *v.* UNITED STATES. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Solid Waste Agency of Northern Cook Cty.* v. *Army Corps of Engineers*, 531 U. S. 159 (2001). Reported below: 235 F. 3d 256.

Miscellaneous Orders

No. D–2235. IN RE DISBARMENT OF HOLLINGSWORTH. Disbarment entered. [For earlier order herein, see 531 U. S. 1138.]

No. D–2239. IN RE DISBARMENT OF ELKINS. Disbarment entered. [For earlier order herein, see 531 U. S. 1138.]

No. D–2240. IN RE DISBARMENT OF FREDERICK. Disbarment entered. [For earlier order herein, see 531 U. S. 1138.]

No. D–2241. IN RE DISBARMENT OF GOMSRUD. Disbarment entered. [For earlier order herein, see 531 U. S. 1138.]

No. D–2242. IN RE DISBARMENT OF FREEMAN. Disbarment entered. [For earlier order herein, see 531 U. S. 1139.]

No. D–2243. IN RE DISBARMENT OF MCKEE. Disbarment entered. [For earlier order herein, see 531 U. S. 1139.]

No. D–2244. IN RE DISBARMENT OF SEAGULL. Disbarment entered. [For earlier order herein, see 531 U. S. 1139.]

No. D–2248. IN RE DISBARMENT OF MORRISSEY. Disbarment entered. [For earlier order herein, see 531 U. S. 1139.]

No. D–2249. IN RE DISBARMENT OF RATHJEN. Disbarment entered. [For earlier order herein, see 531 U. S. 1140.]

No. D–2251. IN RE DISBARMENT OF BARRETT. Disbarment entered. [For earlier order herein, see 531 U. S. 1188.]

No. D–2252. IN RE DISBARMENT OF MCGEE. Disbarment entered. [For earlier order herein, see 531 U. S. 1188.]

No. D–2253. IN RE DISBARMENT OF SIEGFRIED. Disbarment entered. [For earlier order herein, see 531 U. S. 1188.]

No. 00–1406. CHEVRON U. S. A. INC. *v.* ECHAZABAL. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 00–10111. IN RE BOLANO;

No. 00–10204. IN RE FLOWERS; and

No. 00–10222. IN RE THOMAS. Petitions for writs of habeas corpus denied.

No. 00–10228. IN RE WESTINE. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8.

No. 00–10456 (00A1072). IN RE GARZA. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

No. 00–9459. IN RE PETWAY; and

No. 00–9945. IN RE VONIA. Petitions for writs of mandamus denied.

No. 00–1671. IN RE MENSAH. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 00–1543. FESTO CORP. *v.* SHOKETSU KINZOKU KOGYO KABUSHIKI CO., LTD., ET AL. C. A. Fed. Cir. Certiorari granted. Reported below: 234 F. 3d 558.

Certiorari Denied

No. 99–1553. PENNSYLVANIA *v.* GINDLESPERGER. Sup. Ct. Pa. Certiorari denied. Reported below: 560 Pa. 222, 743 A. 2d 898.

No. 00–845. HOOD, AS GUARDIAN AD LITEM OF HOOD, A MINOR *v.* MEDFORD TOWNSHIP BOARD OF EDUCATION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 226 F. 3d 198.

No. 00–1297. HORIZON AIR INDUSTRIES, INC. *v.* NATIONAL MEDIATION BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 232 F. 3d 1126.

No. 00–1338. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 248 F. 3d 1177.

No. 00–1360. NEW YORK STATE BOARD OF ELECTIONS *v.* LERMAN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 232 F. 3d 135.

No. 00–1423. LEAHY *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 251 F. 3d 170.

No. 00–1442. MEYER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 234 F. 3d 319.

No. 00–1447. GSCHWIND, IN HER OWN RIGHT, AS ADMINISTRATRIX OF THE ESTATE OF GSCHWIND, AND AS PARENT AND NATURAL GUARDIAN OF GSCHWIND *v.* CESSNA AIRCRAFT CO. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 232 F. 3d 1342.

No. 00–1505. MONOGRAM CREDIT CARD BANK OF GEORGIA *v.* HEATON. C. A. 5th Cir. Certiorari denied. Reported below: 231 F. 3d 994.

No. 00–1583. KAHN *v.* DEAN & FULKERSON, P. C., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 238 F. 3d 421.

No. 00–1592. BALTIMORE SCRAP CORP. *v.* DAVID J. JOSEPH CO., T/A UNITED IRON & METAL CO., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 237 F. 3d 394.

No. 00–1593. TURNER ET AL. *v.* WORRELL. C. A. 10th Cir. Certiorari denied. Reported below: 219 F. 3d 1197.

No. 00–1596. BOARD OF EDUCATION OF THE SAN JUAN SCHOOL DISTRICT *v.* SINAJINI ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 233 F. 3d 1236.

No. 00–1601. BELDEN *v.* BOARD OF DIRECTORS OF THE COUNCIL OF UNIT OWNERS OF ISLAND PARK ET AL. Ct. Civ. App. Okla. Certiorari denied.

No. 00–1606. CHANDLER, FATHER AND NEXT FRIEND OF CHANDLER *v.* SIEGELMAN, GOVERNOR OF ALABAMA AND PRESIDENT OF ALABAMA STATE BOARD OF EDUCATION, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 230 F. 3d 1313.

No. 00–1616. CAMPAIGN FOR RATEPAYERS RIGHTS ET AL. *v.* PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE ET AL. Sup. Ct. N. H. Certiorari denied. Reported below: 145 N. H. 671, 766 A. 2d 702.

No. 00–1622. EMERY *v.* CITY OF TOLEDO. Ct. App. Ohio, Lucas County. Certiorari denied.

No. 00–1624. HCMF CORP. ET AL. *v.* ALLEN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 273.

No. 00–1640. MAREKH *v.* EQUIFAX CREDIT INFORMATION SERVICES, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 242 F. 3d 366.

No. 00–1659. ALLISON ET UX. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 238 F. 3d 427.

No. 00–1678. HAMILTON *v.* WORKERS' COMPENSATION APPEALS BOARD ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 00–1684. AHMED *v.* PARADISE LAKES COUNTRY CLUB ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 243 F. 3d 546.

No. 00–1697. WILLIAMS *v.* CORPORATE EXPRESS DELIVERY SYSTEMS. C. A. 4th Cir. Certiorari denied. Reported below: 243 F. 3d 545.

No. 00–1702. BALLEW *v.* DEPARTMENT OF JUSTICE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 244 F. 3d 138.

No. 00–1705. PHILLIPS *v.* COMPUWARE CORP. C. A. 5th Cir. Certiorari denied. Reported below: 248 F. 3d 1144.

No. 00–1722. GARRETT ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 238 F. 3d 293.

No. 00–1725. SANGHVI *v.* FRENDEL ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 242 F. 3d 367.

No. 00–1733. JONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 743.

No. 00–8101. LEWIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 234 F. 3d 32.

No. 00–8428. SOKOLOW *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 00–8729. QUINN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 229 F. 3d 1148.

No. 00–8750. BOYEA *v.* VERMONT; and SMITH *v.* VERMONT. Sup. Ct. Vt. Certiorari denied. Reported below: 171 Vt. 401, 765 A. 2d 862 (first judgment); 171 Vt. 668, 769 A. 2d 1303 (second judgment).

No. 00–8973. SAUNDERS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 236 F. 3d 950.

No. 00–8984. SMITH *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: 303 Mont. 47, 15 P. 3d 395.

No. 00–8994. COLLINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 00–9026. MCGUIRE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 220 F. 3d 589.

No. 00–9040. RANGEL-MENDOZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 244 F. 3d 137.

No. 00–9399. TRINIDAD *v.* CASTRO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 00–9403. KIRTLEY *v.* BAKER. Ct. App. Wash. Certiorari denied.

No. 00–9408. BOATENG ET UX. *v.* INTER AMERICAN UNIVERSITY OF PUERTO RICO ET AL. C. A. 1st Cir. Certiorari denied.

No. 00–9410. DEPARRIE *v.* HANZO ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 5 Fed. Appx. 601.

No. 00–9417. OLECIK *v.* KNOWLES, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 00–9420. EDGE *v.* STALDER, SECRETARY, LOUISIANA BOARD OF PUBLIC SAFETY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 240 F. 3d 1074.

No. 00–9421. LINARES *v.* SUFFOLK COUNTY DEPARTMENT OF SOCIAL SERVICES. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 276 App. Div. 2d 699, 714 N. Y. S. 2d 357.

No. 00–9424. KING *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 00–9428. MARTIN *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–9430. BRODERICK *v.* ASHCROFT, ATTORNEY GENERAL, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 00–9431. CREGGETT *v.* FORD KENTUCKY TRUCK PLANT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 238 F. 3d 420.

No. 00–9437. LOPER *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–9438. MADANI *v.* UNIVERSITY OF NEBRASKA BOARD OF REGENTS. C. A. 8th Cir. Certiorari denied. Reported below: 242 F. 3d 376.

No. 00–9440. STELLY *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 00–9441. RISHAR *v.* ROE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 00–9443. EVANS *v.* YUKINS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 00–9450. MERRIDA *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 00–9451. ANDRADE *v.* CALIFORNIA WORKERS' COMPENSATION APPEALS BOARD. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 00–9458. MENDLOW *v.* UNIVERSITY OF WASHINGTON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 230 F. 3d 1367.

No. 00–9462. SIMMONS *v.* ARTUZ, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 00–9463. SIMON *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 00–9466. STEWART *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–9469. TIBBS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–9470. WILLIAMS *v.* SMALLS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 00–9471. WOODSIDE *v.* PATTON. Sup. Ct. Del. Certiorari denied. Reported below: 768 A. 2d 472.

No. 00–9473. WHITE *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–9475. RICHARD *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 248 F. 3d 1138.

No. 00–9479. FOSTER *v.* JONES, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 243 F. 3d 547.

No. 00–9480. HERNANDEZ *v.* DUNCAN, SUPERINTENDENT, GREAT MEADOWS CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 00–9482. HINSON *v.* FLORIDA DEPARTMENT OF CORRECTIONS ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–9483. GONZALES *v.* WILLIAMS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 00–9485. FLOURNOY *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 752 So. 2d 35.

No. 00–9487. ZUBIATE *v.* PLILER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 00–9492. EVANS *v.* DeTELLA, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 00–9498. GRESHAM *v.* HAWK SAWYER, DIRECTOR, FEDERAL BUREAU OF PRISONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 244 F. 3d 133.

No. 00–9537. FUSON *v.* PITCHER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 00–9544. GARCIA *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 00–9642. COULSON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 777 So. 2d 969.

No. 00–9646. SENGER *v.* TERHUNE, COMMISSIONER, NEW JERSEY DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 254 F. 3d 1078.

No. 00–9672. STENNIS *v.* PRESIDING JUDGE OF CIRCUIT COURT OF ILLINOIS, COOK COUNTY. Sup. Ct. Ill. Certiorari denied.

No. 00–9679. TAYLOR *v.* KMART CORP. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 415.

No. 00–9683. CALCARI *v.* SUTHERS, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF CORRECTIONS, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 242 F. 3d 387.

No. 00–9703. FLEMING *v.* CRANE. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 00–9717. HANKS *v.* CALIFORNIA BOARD FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 00–9719. GODWIN *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 140 N. C. App. 151, 539 S. E. 2d 58.

No. 00–9720. HARRINGTON *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 761 A. 2d 1234.

No. 00–9736. MILLER *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–9758. BAGWELL *v.* TENNESSEE DEPARTMENT OF CHILDREN'S SERVICES. Ct. App. Tenn. Certiorari denied. Reported below: 37 S. W. 3d 925.

No. 00–9765. BEARD *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied.

No. 00–9814. CHUN-HSUAN SU *v.* POLYTECHNIC UNIVERSITY. C. A. 1st Cir. Certiorari denied.

No. 00–9818. FRAZIER *v.* TURNER ET AL. C. A. 8th Cir. Certiorari denied.

No. 00–9848. MCROBERTS *v.* LUEBBERS, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 234 F. 3d 1021.

No. 00–9872. LYND *v.* TURPIN, WARDEN. Super. Ct. Butts County, Ga. Certiorari denied.

No. 00–9873. CAMPBELL *v.* HENDERSON, POSTMASTER GENERAL. C. A. 9th Cir. Certiorari denied.

No. 00–9874. DAVENPORT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 229 F. 3d 1144.

No. 00–9879. DUBLIN ET AL. *v.* UNITED STATES BANKRUPTCY COURT ET AL. C. A. 9th Cir. Certiorari denied.

No. 00–9881. CASTRO-ALVAREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 00–9903. PHILLIPS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 246 F. 3d 683.

No. 00–9906. JONES *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 248 F. 3d 1134.

No. 00–9917. HARRIS *v.* COMPTON, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 00–9922. FINLEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 00–9923. HARRIS *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 00–9924. HAWKINS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 00–9926. HINKSON, AKA WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 248 F. 3d 1142.

No. 00–9930. FERREIRA, AKA GONZALEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 228 F. 3d 417.

No. 00–9940. OLIVARES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 740.

No. 00–9953. GUESS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 187 F. 3d 638.

No. 00–9954. BOWMAN *v.* ELLIS, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 234 F. 3d 1264.

No. 00–9956. CANDELARIO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 240 F. 3d 1300.

No. 00–9958. PAYNE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 240 F. 3d 1076.

No. 00–9961. LEESE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 250 F. 3d 736.

No. 00–9963. QUARTERMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 242 F. 3d 392.

No. 00–9967. SULUKI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 232 F. 3d 892.

No. 00–9969. DAVALOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 248 F. 3d 1173.

No. 00–9970. CORRERA-GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 742.

No. 00–9971. CERROS-CHAVIRA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 250 F. 3d 750.

No. 00–9972. CLARK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 250 F. 3d 736.

No. 00–9979. NAVA-PEREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 242 F. 3d 277.

No. 00–9980. PARRA-FLORES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 742.

No. 00–9981. PACHECO-MARTINEZ, AKA PACHECO DE MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 742.

No. 00–9982. PONZ-GOMEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 250 F. 3d 750.

No. 00–9984. ROMERO RAMOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 743.

No. 00–9985. MATA-HUERTA, AKA MATA, ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 742 and 743.

No. 00–9990. SANCHEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 00–9999. PAROLIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 239 F. 3d 922.

No. 00–10000. WATSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 00–10006. HAYWOOD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 250 F. 3d 736.

No. 00–10007. FIX *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 4 Fed. Appx. 324.

No. 00–10009. HATCHER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 00–10013. PARRISH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 248 F. 3d 1177.

No. 00–10017. GRANT ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 261 F. 3d 494.

No. 00–10046. SCHILLING *v.* KINGSTON, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 00–10061. RASHED *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 234 F. 3d 1280.

No. 00–1577. CAIN, WARDEN *v.* RIDEAU. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 237 F. 3d 472.

No. 00–1653. GRIMES *v.* WETZLER, FORMER COMMISSIONER OF TAXATION AND FINANCE OF NEW YORK, ET AL. Super. Ct. Pa. Certiorari denied. JUSTICE GINSBURG took no part in the consideration or decision of this petition. Reported below: 749 A. 2d 535.

No. 00–10631 (00A1101). GARZA *v.* LAPPIN, WARDEN. C. A. 7th Cir. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied. Reported below: 253 F. 3d 918.

Rehearing Denied

No. 99–1408. ATWATER ET AL. *v.* CITY OF LAGO VISTA ET AL., 532 U. S. 318;

No. 99–7693. DEL RIO *v.* UNITED STATES, 528 U. S. 1176;

No. 00–1121. KOZEL *v.* ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION, 531 U. S. 1153;

No. 00–1353. NIXON ET UX. *v.* PENNSYLVANIA, 532 U. S. 1008;

No. 00–7180. MORELAND *v.* BARRY ET AL., 531 U. S. 1156;

No. 00–7676. CAMPA-FABELA *v.* UNITED STATES, 532 U. S. 1010;

No. 00–7869. GOLDEN *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 531 U. S. 1197;

No. 00–8568. BROWN *v.* KASHYAP ET AL., 532 U. S. 979;

No. 00–8614. COURTNEY *v.* ROBINSON, WARDEN, ET AL., 532 U. S. 996;

No. 00–8616. HALL *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA, 532 U. S. 997; and

No. 00–8696. TORREZ *v.* DICKINSON, 532 U. S. 1010. Petitions for rehearing denied.

No. 00–1481. POWERS, FKA STUDINGER *v.* COMMISSIONER OF INTERNAL REVENUE, 532 U. S. 995. Motion of petitioner for leave to proceed *in forma pauperis* granted. Petition for rehearing denied.

JUNE 21, 2001

Miscellaneous Orders

No. 00A1112 (00–10728). HOLLADAY *v.* ALABAMA. Sup. Ct. Ala. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, granted pending disposition of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is granted, the stay shall terminate upon issuance of the mandate of this Court.

No. 00A1114 (00–10749). IN RE HOLLADAY. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, granted pending further order of the Court.

JUNE 25, 2001

Certiorari Granted—Vacated and Remanded

No. 00–1279. HOUSEHOLD INTERNATIONAL TAX REDUCTION INVESTMENT PLAN *v.* MATZ. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Mead Corp.*, *ante*, p. 218. Reported below: 227 F. 3d 971.

No. 00–1456. COFFEY *v.* MCNAIR ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further

consideration in light of *Saucier* v. *Katz*, *ante*, p. 194. Reported below: 234 F. 3d 352.

Certiorari Dismissed

No. 00–9528. HAMILTON *v.* GARCIA, WARDEN. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 00–10065. ANDERSON *v.* UNITED STATES. C. A. Fed. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 4 Fed. Appx. 871.

No. 00–9592. SAUNDERS *v.* KEARNEY, WARDEN, ET AL. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

Miscellaneous Orders

No. 00A1057 (00–1671). IN RE MENSAH. Application for preliminary injunction and other relief, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. 00M97. OWENS *v.* UNITED STATES. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 00M98. HANES *v.* UNITED STATES. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 131, Orig. SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMMISSION *v.* NORTH CAROLINA. Motion for leave to file bill of complaint denied. [For earlier order herein, see 531 U. S. 942.]

No. 00–1471. KENTUCKY ASSOCIATION OF HEALTH PLANS, INC., ET AL. *v.* MILLER, COMMISSIONER, KENTUCKY DEPARTMENT OF INSURANCE. C. A. 6th Cir. The Solicitor General is invited

to file a brief in this case expressing the views of the United States.

No. 00–8554. BROWN *v.* CHICAGO TRANSIT AUTHORITY. C. A. 7th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [532 U. S. 969] denied.

No. 00–9285. MICKENS *v.* TAYLOR, WARDEN. C. A. 4th Cir. [Certiorari granted, 532 U. S. 970.] Motion for appointment of counsel granted, and it is ordered that Robert J. Wagner, Esq., of Richmond, Va., be appointed to serve as counsel for petitioner in this case.

No. 00–9545. SWOYER *v.* KERCHER ET AL. C. A. 3d Cir.;
No. 00–9551. SWOYER *v.* MERCHANTS BANK. Sup. Ct. Pa.;
No. 00–9554. SWOYER *v.* REED. Sup. Ct. Pa.; and
No. 00–9713. RADIC *v.* FLAXMAN ET AL. App. Ct. Ill., 1st Dist. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until July 16, 2001, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 00–10273. IN RE JOHNSON. Petition for writ of habeas corpus denied.

No. 00–9586. IN RE AWOFOLU; and
No. 00–10093. IN RE DUDLEY. Petitions for writs of mandamus denied.

Certiorari Granted

No. 00–1073. OWASSO INDEPENDENT SCHOOL DISTRICT NO. I–011, AKA OWASSO PUBLIC SCHOOLS, ET AL. *v.* FALVO, PARENT AND NEXT FRIEND OF HER MINOR CHILDREN, PLETAN ET AL. C. A. 10th Cir. Certiorari granted. Reported below: 233 F. 3d 1203.

No. 00–1614. NATIONAL RAILROAD PASSENGER CORPORATION *v.* MORGAN. C. A. 9th Cir. Certiorari granted. Reported below: 232 F. 3d 1008.

No. 00–952. WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES *v.* BLUMER. Ct. App. Wis. Motion of respondent

for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 237 Wis. 2d 810, 615 N. W. 2d 647.

No. 00–1072. EDELMAN *v.* LYNCHBURG COLLEGE. C. A. 4th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 228 F. 3d 503.

No. 00–1531. VERIZON MARYLAND INC. *v.* PUBLIC SERVICE COMMISSION OF MARYLAND ET AL.; and

No. 00–1711. UNITED STATES *v.* PUBLIC SERVICE COMMISSION OF MARYLAND ET AL. C. A. 4th Cir. Certiorari granted limited to Question 2 presented by each petition, cases consolidated, and a total of one hour allotted for oral argument. Cases set for oral argument in tandem with No. 00–878, *Mathias et al.* v. *WorldCom Technologies, Inc., et al.* [certiorari granted, 532 U. S. 903]. JUSTICE O'CONNOR took no part in the consideration or decision of these petitions. Reported below: 240 F. 3d 279.

No. 00–6029. RAGSDALE ET AL. *v.* WOLVERINE WORLD WIDE, INC. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to the question presented by the Solicitor General in his brief for the United States as *amicus curiae*. Reported below: 218 F. 3d 933.

No. 00–9280. KELLY *v.* SOUTH CAROLINA. Sup. Ct. S. C. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 343 S. C. 350, 540 S. E. 2d 851.

Certiorari Denied

No. 99–7760. PURTUE *v.* GALAZA, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 00–720. CHUBB & SON, INC. *v.* ASIANA AIRLINES. C. A. 2d Cir. Certiorari denied. Reported below: 214 F. 3d 301.

No. 00–1332. NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., ET AL. *v.* ASHCROFT, ATTORNEY GENERAL. C. A. D. C. Cir. Certiorari denied. Reported below: 216 F. 3d 122.

No. 00–1472. COWAN, WARDEN *v.* WILKINSON. C. A. 7th Cir. Certiorari denied. Reported below: 231 F. 3d 347.

No. 00–1473. GOLDSTEIN ET AL. *v.* CHAO, SECRETARY OF LABOR. C. A. 2d Cir. Certiorari denied. Reported below: 224 F. 3d 128.

No. 00–1484. NISSAN MOTOR ACCEPTANCE CORP. *v.* APPLEBAUM. C. A. 3d Cir. Certiorari denied. Reported below: 226 F. 3d 214.

No. 00–1489. MOTOR CARGO, INC. *v.* ROBERTSON. Ct. App. Ariz. Certiorari denied.

No. 00–1541. LI SECOND FAMILY LIMITED PARTNERSHIP *v.* TOSHIBA CORP. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 231 F. 3d 1373.

No. 00–1573. MITCHELL *v.* NEW YORK BLOOD CENTER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 225 F. 3d 646.

No. 00–1578. TEXAS *v.* REYES. Ct. App. Tex., 8th Dist. Certiorari denied. Reported below: 22 S. W. 3d 516.

No. 00–1608. MOUNTAINEER COAL DEVELOPMENT CO., DBA MARROWBONE DEVELOPMENT CO. *v.* RADEC, INC. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 210 W. Va. 1, 552 S. E. 2d 377.

No. 00–1609. TEXAS ET AL. *v.* HOPWOOD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 236 F. 3d 256.

No. 00–1610. TAUNT, TRUSTEE *v.* GENERAL RETIREMENT SYSTEM OF CITY OF DETROIT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 233 F. 3d 899.

No. 00–1620. FARRELL LINES INC. *v.* DINO ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 251 F. 3d 153.

No. 00–1623. FORBES ET AL. *v.* EAGLESON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 228 F. 3d 471.

No. 00–1626. INDUSTRIVARDEN SERVICE AB *v.* CLUNE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 233 F. 3d 538.

No. 00–1628. NEBRASKA EX REL. STENBERG, ATTORNEY GENERAL OF NEBRASKA *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 238 F. 3d 946.

No. 00–1630. KANTH *v.* KANTH. C. A. 10th Cir. Certiorari denied. Reported below: 232 F. 3d 901.

No. 00–1631. KINAM GOLD, INC., ET AL. *v.* LETTES. C. A. 10th Cir. Certiorari denied. Reported below: 242 F. 3d 389.

No. 00–1632. JERCICH *v.* PETRALIA. C. A. 9th Cir. Certiorari denied. Reported below: 238 F. 3d 1202.

No. 00–1635. YORK *v.* WRATHER ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 242 F. 3d 392.

No. 00–1641. AETNA U. S. HEALTHCARE, T/A HMO–PA, U. S. HEALTHCARE *v.* LAZORKO, AS ADMINISTRATOR OF THE ESTATE OF NORLIE. C. A. 3d Cir. Certiorari denied. Reported below: 237 F. 3d 242.

No. 00–1644. LANGFELDT ET AL. *v.* GENESIS MEDICAL CENTER. Ct. App. Iowa. Certiorari denied.

No. 00–1650. SIMON *v.* QUAKER OATS EMPLOYEE BENEFIT PLAN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 234 F. 3d 1274.

No. 00–1652. JORDAN *v.* ZORC. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 765 So. 2d 768.

No. 00–1654. SPARKS *v.* CASH AMERICA INTERNATIONAL, INC., ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 789 So. 2d 231.

No. 00–1658. LAPERTOSA *v.* MARQUETTE UNIVERSITY. Ct. App. Wis. Certiorari denied. Reported below: 239 Wis. 2d 593, 620 N. W. 2d 482.

No. 00–1662. NELSON *v.* COLORADO. Sup. Ct. Colo. Certiorari denied.

No. 00–1665. WEHBY *v.* WARD ET UX. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 00–1675. KILGORE ET AL. *v.* BLACK STONE OIL CO. ET AL. Ct. App. Tex., 9th Dist. Certiorari denied. Reported below: 15 S. W. 3d 666.

No. 00–1676. MASSANOVA ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 242 F. 3d 372.

No. 00–1679. SVEC *v.* MORIARTY. C. A. 7th Cir. Certiorari denied. Reported below: 233 F. 3d 955.

No. 00–1681. WOLFE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 234 F. 3d 1271.

No. 00–1696. SL SERVICE, INC., ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 239 F. 3d 1366.

No. 00–1698. GRACEBA TOTAL COMMUNICATIONS, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 254 F. 3d 315.

No. 00–1721. CHAIN, DBA JEFFREY CHAIN CORP. *v.* TROPODYNE CORP. C. A. 6th Cir. Certiorari denied. Reported below: 238 F. 3d 421.

No. 00–1734. KALAMA CHEMICAL, INC., ET AL. *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 102 Wash. App. 577, 9 P. 3d 236.

No. 00–1736. TITTJUNG *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 235 F. 3d 330.

No. 00–1756. HAMILTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 242 F. 3d 368.

No. 00–5778. EVANS *v.* GALAZA, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 00–7339. WILSON *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–7803. JEFFUS *v.* SIVLEY, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 00–8097. COUNCE *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 214 F. 3d 1349.

No. 00–8546. BURLESON *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 245 F. 3d 790.

No. 00–8617. MERCED-NIEVES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 248 F. 3d 1128.

No. 00–8624. KHAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 00–8702. SIMPSON *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 562 Pa. 255, 754 A. 2d 1264.

No. 00–8951. ANGLE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 234 F. 3d 326.

No. 00–8995. QUIROS MORALES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 00–9053. ALLEN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 755 A. 2d 402.

No. 00–9075. ONWUASOANYA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 245 F. 3d 790.

No. 00–9076. PRUITT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 233 F. 3d 570.

No. 00–9141. WHITE *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 145 N. H. 544, 765 A. 2d 156.

No. 00–9433. CONNER *v.* HEAD, WARDEN. Sup. Ct. Ga. Certiorari denied.

No. 00–9494. IN HO LEE *v.* HICKMAN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 00–9502. BESS *v.* ROE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 00–9504. HINOJOSA *v.* MAYER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 232 F. 3d 208.

No. 00–9506. HIGH ET UX. *v.* MORRISON ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 232 F. 3d 215.

No. 00–9512. GONZALES *v.* MEYERS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ROCKVIEW. C. A. 3d Cir. Certiorari denied.

No. 00–9515. PRADO *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–9520. WHISENANT *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 418.

No. 00–9521. THOMPSON *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–9522. HIGGASON *v.* FINNAN ET AL. Ct. App. Ind. Certiorari denied. Reported below: 735 N. E. 2d 857.

No. 00–9523. HOSS *v.* JACKSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 00–9531. FRENCH *v.* HUBBARD, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 00–9536. HUMPHREY *v.* RAY, WARDEN, ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 00–9538. GARDNER *v.* GREINER, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 00–9540. GAINES *v.* CARROLL ET AL. C. A. 5th Cir. Certiorari denied.

No. 00–9541. HANDY *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 00–9542. HARRISON *v.* HODGES, GOVERNOR OF SOUTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 225 F. 3d 654.

No. 00–9547. SCHEIB *v.* MELLON BANK ET AL. Super. Ct. Pa. Certiorari denied.

No. 00–9552. RAMSEY *v.* BOOKER, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL. C. A. 5th Cir. Certiorari denied.

No. 00–9558. WALKER *v.* GIBSON, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 228 F. 3d 1217.

No. 00–9562. C. C. ET AL. *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 33 S. W. 3d 656.

No. 00–9565. SALAZAR *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–9566. GIUCHICI *v.* PITCHER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 00–9569. HICKS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–9570. HANSFORD *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–9571. HARVEY *v.* SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 229 F. 3d 1142.

No. 00–9572. DAVIS *v.* LUEBBERS, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 00–9573. GARCIA *v.* CAREY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 00–9574. HOLLEY *v.* BAKER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 230 F. 3d 1352.

No. 00–9576. IN RE MICEK. Ct. Crim. App. Tex. Certiorari denied.

No. 00–9578. LUKEHART *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 776 So. 2d 906.

No. 00–9579. LEGARDY *v.* ROE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 00–9583. BAYOUD *v.* MIMS ET AL. C. A. 5th Cir. Certiorari denied.

No. 00–9585. MAGOON *v.* TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 247 F. 3d 240.

No. 00–9591. MACOM *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 102 Wash. App. 1039.

No. 00–9594. VALECK *v.* BOCK, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 00–9603. WILLIAMS *v.* LARSON, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 246 F. 3d 678.

No. 00–9612. BAILEY *v.* CITY OF KALAMAZOO. Ct. App. Mich. Certiorari denied.

No. 00–9613. BLACKWELL *v.* HOHN, AKA HAUN. C. A. 8th Cir. Certiorari denied. Reported below: 235 F. 3d 1121.

No. 00–9614. MAHARAJ *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 778 So. 2d 944.

No. 00–9625. SANDERS *v.* TEXAS (two judgments). Ct. Crim. App. Tex. Certiorari denied.

No. 00–9626. SUROVIK *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 245 F. 3d 791.

No. 00–9627. LOFTEN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 00–9631. WHITE *v.* UTAH ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 246 F. 3d 684.

No. 00–9668. SMITH *v.* SAFFLE, DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 242 F. 3d 390.

No. 00–9669. ESPOSITO *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 273 Ga. 183, 538 S. E. 2d 55.

No. 00–9676. JEFFERSON *v.* SMALLS. C. A. 9th Cir. Certiorari denied.

No. 00–9682. CARTER *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 00–9693. LOFLEY *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–9712. HENDERSON *v.* LOCKYER, ATTORNEY GENERAL OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 00–9728. JOHNSON *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Va. Certiorari denied.

No. 00–9729. JOHNSON *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 412.

No. 00–9754. TROBAUGH *v.* SONDAG. C. A. 8th Cir. Certiorari denied. Reported below: 248 F. 3d 1166.

No. 00–9772. ACKLIN *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 790 So. 2d 975.

No. 00–9782. KING ET AL. *v.* LOUISIANA. Ct. App. La., 3d Cir. Certiorari denied.

No. 00–9791. MYHAND *v.* FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 00–9811. HARRIS *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 00–9854. WALSH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 179 F. 3d 1300.

No. 00–9865. BUTLER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 00–9871. BAILEY, AKA KRUGER *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 00–9936. JOHNSON *v.* MITCHELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 00–9942. WHITE *v.* LEE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 418.

No. 00–9955. EDUARDO R. *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 241 Wis. 2d 571, 624 N. W. 2d 420.

No. 00–9968. SARGENT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 242 F. 3d 376.

No. 00–9974. OLIVIERI *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 779 So. 2d 735.

No. 00–9975. PAYNE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 00–9983. PADRON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 00–9992. SANCHEZ-BARILLA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 741.

No. 00–9998. LUCAS *v.* WELBORN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 00–10014. MIKELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 00–10019. SANCHEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 00–10020. ARNOLD ET VIR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 238 F. 3d 1153 and 248 F. 3d 1173.

No. 00–10021. NUNNALLY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 248 F. 3d 1153.

No. 00–10023. MCMILLAN *v.* WALKER, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 00–10024. BELANGER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 00–10026. BOYD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 00–10027. MCKINNEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 00–10028. ROGERS *v.* BRILEY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 00–10030. MARTINEZ-JUAREZ ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 742.

No. 00–10031. ESTRADA-GARCIA ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 742 and 743.

No. 00–10034. CADE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 236 F. 3d 463.

No. 00–10035. KREBS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 232 F. 3d 898.

No. 00–10038. OLIVA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 00–10040. CORTEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 742.

No. 00–10041. CLAIBORNE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 246 F. 3d 668.

No. 00–10042. ROCHA-MENDOZA ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 742.

No. 00–10043. REGALADO-FLORES ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 742 and 743.

No. 00–10044. BALBI-BOBADILLA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 742.

No. 00–10045. PALMISANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 00–10048. TAYLOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 417.

No. 00–10064. LANHAM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 248 F. 3d 1149.

No. 00–10067. ARBALLO-MARQUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 741.

No. 00–10068. KEITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 238 F. 3d 293.

No. 00–10069. PENA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 739.

No. 00–10073. GUZMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 4 Fed. Appx. 109.

No. 00–10075. MORGAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 248 F. 3d 1174.

No. 00–10076. SOTO-RIVAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 741.

No. 00–10081. GARDNER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 00–10086. HERNANDEZ-BENAVIDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 741.

No. 00–10087. HANON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 248 F. 3d 1173.

No. 00–10088. GAY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 240 F. 3d 1222.

No. 00–10091. ARNOLDI *v.* STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 00–10101. CHARLES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 00–10103. DOWDY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 00–10107. SIMMONS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 248 F. 3d 1175.

No. 00–10108. STARNES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 248 F. 3d 1167.

No. 00–10109. MOTINA-GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 741.

No. 00–10110. MENDOZA-HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 741.

No. 00–10112. KINSEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 250 F. 3d 750.

No. 00–10113. MAYA-FLORES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 4 Fed. Appx. 514.

No. 00–10114. LOREDO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 739.

No. 00–10115. LABRADO-ALVAREZ, AKA LABRADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 743.

No. 00–10116. CONSOLVO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 243 F. 3d 541.

No. 00–10117. MILLIGAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 246 F. 3d 670.

No. 00–10119. SIDDIQUI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 235 F. 3d 1318.

No. 00–10122. RIOS-PENA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 742.

No. 00–10124. SIMMONS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 250 F. 3d 737.

No. 00–10129. STEPHENSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 242 F. 3d 369.

No. 00–10130. LOVE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 00–10137. CASTILLO *v.* UNITED STATES; GUTIERREZ-GUTIERREZ *v.* UNITED STATES; MUNIZ-DE LA TORRE *v.* UNITED STATES; POLANCO-SALAS *v.* UNITED STATES; REYNA-BRECEDA *v.* UNITED STATES; RIOS-HERNANDEZ *v.* UNITED STATES; and RIOS-ROSAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 742.

No. 00–10141. ROGERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 246 F. 3d 670.

No. 00–10143. VALENCIA-MERAZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 00–10150. LUNA-RODRIGUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 242 F. 3d 384.

No. 00–10151. SCHAEFER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 250 F. 3d 747.

No. 00–10155. BUTLER, AKA BROWN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 250 F. 3d 736.

No. 00–10159. MAXWELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 250 F. 3d 748.

No. 00–10161. KEELING *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 235 F. 3d 533.

No. 00–10162. MAYS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 416.

No. 00–10168. ZANUDO-AMADO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 4 Fed. Appx. 510.

No. 00–10183. POWERS *v.* WINGARD, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 248 F. 3d 1151.

No. 00–10188. BLACK *v.* BRIGANO, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 238 F. 3d 419.

No. 00–1438. REYNOLDS ET AL. *v.* ROBERTS, DIRECTOR, ALABAMA DEPARTMENT OF TRANSPORTATION, ET AL. C. A. 11th Cir. Motion of National Bar Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 207 F. 3d 1288.

No. 00–1464. PHELPS DODGE CORP. ET AL. *v.* UNITED STATES ET AL. Sup. Ct. Ariz. Motion of Pacific Legal Foundation for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 198 Ariz. 330, 9 P. 3d 1069.

No. 00–1509. CAMBRA, WARDEN *v.* ANTHONY. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 236 F. 3d 568.

No. 00–1607. PARKER, WARDEN *v.* GALL. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 231 F. 3d 265.

No. 00–1636. TEN EYCK ET AL. *v.* LEATHER. C. A. 2d Cir. Motion of New York State Sheriffs' Association Institute, Inc., et al., for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 242 F. 3d 366.

No. 00–1663. PENK *v.* CLINTON, FORMER PRESIDENT OF THE UNITED STATES. C. A. 10th Cir. Certiorari before judgment denied.

Rehearing Denied

No. 00–1555. IN RE RETTIG, 532 U. S. 1037;
No. 00–5522. WHITE *v.* UNITED STATES, 532 U. S. 1009;
No. 00–8585. SIMPKINS *v.* FANNIE MAE ET AL., 532 U. S. 996;

No. 00–8625. BROOKS-BEY *v.* KUPEC, WARDEN, ET AL., 532 U. S. 952;

No. 00–8741. SKOLNICK ET AL. *v.* ILLINOIS ET AL., 532 U. S. 1011;

No. 00–8794. PITTS *v.* GEORGIA, 532 U. S. 1024;

No. 00–8797. MULDROW *v.* LAKE CITY POLICE DEPARTMENT ET AL., 532 U. S. 982;

No. 00–8812. IN RE WHITE, 532 U. S. 970;

No. 00–8980. DAVIS *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 532 U. S. 999;

No. 00–8988. SECOR *v.* INDIANA DEPARTMENT OF REVENUE, 532 U. S. 999;

No. 00–9188. LEVINE *v.* UNITED STATES, 532 U. S. 1013; and

No. 00–9315. SINDRAM *v.* UNITED STATES, 532 U. S. 1031. Petitions for rehearing denied.

JUNE 26, 2001

Miscellaneous Order

No. 00–10811 (00A1132). IN RE LOWERY. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 00–1911 (00A1117). RICHARDSON *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

No. 00–1917 (00A1131). RICHARDSON *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. Reported below: 256 F. 3d 257.

No. 00–10796 (00A1120). LOWERY *v.* INDIANA. Sup. Ct. Ind. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied.

JUNE 29, 2001

Certiorari Granted—Vacated and Remanded

No. 00–268. ZALAWADIA *v.* ASHCROFT, ATTORNEY GENERAL, ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *INS* v. *St. Cyr*, *ante*, p. 289.

No. 00–285. MCQUEEN *v.* SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT. Sup. Ct. S. C. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Palazzolo* v. *Rhode Island*, *ante*, p. 606. Reported below: 340 S. C. 65, 530 S. E. 2d 628.

No. 00–523. OBAJULUWA *v.* ASHCROFT, ATTORNEY GENERAL, ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *INS* v. *St. Cyr*, *ante*, p. 289. Reported below: 226 F. 3d 641.

No. 00–668. IMMIGRATION AND NATURALIZATION SERVICE *v.* YOUR KHORN. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Zadvydas* v. *Davis*, *ante*, p. 678.

No. 00–750. IMMIGRATION AND NATURALIZATION SERVICE *v.* SRIMENAGSAM. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Zadvydas* v. *Davis*, *ante*, p. 678.

No. 00–751. IMMIGRATION AND NATURALIZATION SERVICE *v.* MOUNSAVENG. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Zadvydas* v. *Davis*, *ante*, p. 678.

No. 00–752. FASANO, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, ET AL. *v.* MINH NHAT PHAN. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Zadvydas* v. *Davis*, *ante*, p. 678.

No. 00–768. IMMIGRATION AND NATURALIZATION SERVICE *v.* NAM NGUYEN. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Zadvydas* v. *Davis*, *ante*, p. 678.

No. 00–769. IMMIGRATION AND NATURALIZATION SERVICE *v.* CHHUN. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Zadvydas* v. *Davis*, *ante*, p. 678.

No. 00–777. ASHCROFT, ATTORNEY GENERAL *v.* LIM. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Zadvydas* v. *Davis*, *ante*, p. 678.

No. 00–985. IMMIGRATION AND NATURALIZATION SERVICE *v.* THANH DUC TRAN. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Zadvydas* v. *Davis*, *ante*, p. 678.

No. 00–986. IMMIGRATION AND NATURALIZATION SERVICE *v.* PHETSANY. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Zadvydas* v. *Davis*, *ante*, p. 678.

No. 00–987. IMMIGRATION AND NATURALIZATION SERVICE *v.* OURK. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Zadvydas* v. *Davis*, *ante*, p. 678.

No. 00–1000. IMMIGRATION AND NATURALIZATION SERVICE *v.* BE HUU NGUYEN. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Zadvydas* v. *Davis*, *ante*, p. 678.

No. 00–1001. IMMIGRATION AND NATURALIZATION SERVICE *v.* PHUONG PHUC LE. C. A. 9th Cir. Motion of respondent for

leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Zadvydas* v. *Davis*, *ante*, p. 678.

No. 00–1136. NIXON, ATTORNEY GENERAL OF MISSOURI, ET AL. *v.* MISSOURI REPUBLICAN PARTY ET AL. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Federal Election Comm'n* v. *Colorado Republican Federal Campaign Comm.*, *ante*, p. 431. Reported below: 227 F. 3d 1070.

No. 00–1300. DODGE *v.* GRAVILLE ET VIR. Ct. App. Ariz. Motion of AARP for leave to file a brief as *amicus curiae* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Troxel* v. *Granville*, 530 U. S. 57 (2000). Reported below: 197 Ariz. 591, 5 P. 3d 925.

No. 00–1327. FASANO, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE *v.* RICHARDS-DIAZ. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *INS* v. *St. Cyr*, *ante*, p. 289. Reported below: 233 F. 3d 1160.

No. 00–5970. RUSSELL *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *INS* v. *St. Cyr*, *ante*, p. 289. Reported below: 216 F. 3d 1091.

No. 00–6280. MAX-GEORGE *v.* ASHCROFT, ATTORNEY GENERAL, ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *INS* v. *St. Cyr*, *ante*, p. 289. Reported below: 205 F. 3d 194.

Certiorari Dismissed

No. 00–9647. RENOIR *v.* CORRECTIONAL MEDICAL SERVICES, INC., ET AL. Cir. Ct. Wise County, Va. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from peti-

tioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

No. 00–9666. TATUM *v.* MARYLAND DIVISION OF CORRECTION ET AL. Ct. Sp. App. Md. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 00A1064 (00–1692). WETLANDS ACTION NETWORK ET AL. *v.* UNITED STATES ARMY CORPS OF ENGINEERS ET AL. C. A. 9th Cir. Application for stay, addressed to JUSTICE BREYER and referred to the Court, denied.

No. 00M99. HUNTER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 00M101. BRUETMAN *v.* HERBSTEIN. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 00M100. LEAK *v.* UNITED STATES. Motion of petitioner for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner denied.

No. 65, Orig. TEXAS *v.* NEW MEXICO. Motion of the River Master for fees and expenses granted, and the River Master is granted a total of $2,645 for the period January 1 through March 31, 2001, to be paid equally by the parties. [For earlier order herein, see, *e. g.*, 531 U. S. 921.]

No. 99–1996. J. E. M. AG SUPPLY, INC., DBA FARM ADVANTAGE, INC., ET AL. *v.* PIONEER HI-BRED INTERNATIONAL, INC. C. A. Fed. Cir. [Certiorari granted, 531 U. S. 1143.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. JUSTICE O'CONNOR took no part in the consideration or decision of this motion.

No. 00–511. VERIZON COMMUNICATIONS INC. ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.;

No. 00–555. WORLDCOM, INC., ET AL. *v.* VERIZON COMMUNICATIONS INC. ET AL.;

No. 00–587. FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* IOWA UTILITIES BOARD ET AL.;

No. 00–590. AT&T CORP. *v.* IOWA UTILITIES BOARD ET AL.; and

No. 00–602. GENERAL COMMUNICATIONS, INC. *v.* IOWA UTILITIES BOARD ET AL. C. A. 8th Cir. [Certiorari granted, 531 U. S. 1124.] Motion of the Solicitor General for divided argument granted. Motion of BellSouth Corp. et al. for additional time for oral argument granted. Thirty additional minutes allotted for that purpose to be divided as follows: 45 minutes for petitioners in No. 00–511, 15 minutes for petitioners in Nos. 00–555 and 00–590, and 30 minutes for the Solicitor General. JUSTICE O'CONNOR took no part in the consideration or decision of these motions.

No. 00–568. NEW YORK ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL.; and

No. 00–809. ENRON POWER MARKETING, INC. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. D. C. Cir. [Certiorari granted, 531 U. S. 1189.] Motion of Pennsylvania Public Utility Commission for leave to file a brief as *amicus curiae* granted. Motion of the Solicitor General for additional time for oral argument and for divided argument granted, and 10 additional minutes allotted for oral argument to be divided as follows: 20 minutes for petitioners in No. 00–568, 20 minutes for petitioner in No. 00–809, and 30 minutes for the Solicitor General. Request for divided rebuttal denied.

No. 00–730. ADARAND CONSTRUCTORS, INC. *v.* MINETA, SECRETARY OF TRANSPORTATION, ET AL. C. A. 10th Cir. [Certiorari granted, 532 U. S. 941 and 967.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 00–832. NATIONAL CABLE & TELECOMMUNICATIONS ASSN., INC. *v.* GULF POWER CO. ET AL.; and

No. 00–843. FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* GULF POWER CO. ET AL. C. A. 11th Cir. [Certiorari granted, 531 U. S. 1125.] Motion of the Solicitor General for divided argument granted. JUSTICE O'CONNOR took no part in the consideration or decision of this motion.

No. 00–860. CORRECTIONAL SERVICES CORP. *v.* MALESKO. C. A. 2d Cir. [Certiorari granted, 532 U. S. 902.] Motion of the

Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 00–1045. TRW INC. *v.* ANDREWS. C. A. 9th Cir. [Certiorari granted, 532 U. S. 902.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 00–1519. UNITED STATES *v.* ARVIZU. C. A. 9th Cir. [Certiorari granted, 532 U. S. 1065.] Motion for appointment of counsel granted, and it is ordered that Victoria A. Brambl, Esq., of Tucson, Ariz., be appointed to serve as counsel for respondent in this case.

No. 00–8898. STEELE *v.* ORANGE COUNTY ET AL. Dist. Ct. App. Fla., 5th Dist. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [532 U. S. 1015] denied.

No. 00–9726. SWOYER *v.* EDGARS ET AL. C. A. 3d Cir.; and
No. 00–9804. FOOTLAND *v.* EVANS, SECRETARY OF COMMERCE, ET AL. C. A. 4th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until July 20, 2001, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 00–1759. IN RE REIDT;
No. 00–9632. IN RE PARNELL;
No. 00–9659. IN RE WALKER;
No. 00–9893. IN RE BRADIN;
No. 00–9948. IN RE HINES; and
No. 00–10053. IN RE WASSENAAR. Petitions for writs of mandamus denied.

Certiorari Granted

No. 00–1021. RUSH PRUDENTIAL HMO, INC. *v.* MORAN ET AL. C. A. 7th Cir. Motion of National Association of Insurance Commissioners for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 230 F. 3d 959.

No. 00–1167. TAHOE-SIERRA PRESERVATION COUNCIL, INC., ET AL. *v.* TAHOE REGIONAL PLANNING AGENCY ET AL. C. A. 9th Cir. Certiorari granted limited to the following question:

"Whether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution?" Reported below: 216 F. 3d 764.

Certiorari Denied

No. 99–9786. PINO MENDIVIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 211 F. 3d 593.

No. 00–362. GALINDO DEL VALLE *v.* ASHCROFT, ATTORNEY GENERAL, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 213 F. 3d 594.

No. 00–753. RODRIGUEZ *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 3d Cir. Certiorari denied. Reported below: 206 F. 3d 308.

No. 00–962. ASHCROFT, ATTORNEY GENERAL *v.* MAHADEO. C. A. 1st Cir. Certiorari denied. Reported below: 226 F. 3d 3.

No. 00–1318. LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, ET AL. *v.* CHATHAS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 233 F. 3d 508.

No. 00–1372. BONEY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 00–1470. RELFORD ET AL. *v.* LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT CIVIL SERVICE COMMISSION. Ct. App. Ky. Certiorari denied.

No. 00–1488. ARKANSAS DEPARTMENT OF EDUCATION *v.* JIM C. ET AL., INDIVIDUALLY AND AS PARENTS AND NEXT FRIENDS OF J. C., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 235 F. 3d 1079.

No. 00–1496. BROWN *v.* DEPARTMENT OF THE NAVY. C. A. Fed. Cir. Certiorari denied. Reported below: 229 F. 3d 1356.

No. 00–1499. AUGUSTUS ET AL. *v.* SURFACE TRANSPORTATION BOARD ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 238 F. 3d 419.

No. 00–1500. MENDIOLA *v.* SCHOMIG, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 224 F. 3d 589.

No. 00–1507. DEPARTMENT OF JUSTICE *v.* MAYDAK. C. A. D. C. Cir. Certiorari denied. Reported below: 218 F. 3d 760.

No. 00–1539. MOORE ET AL. *v.* AFTRA HEALTH AND RETIREMENT FUNDS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 216 F. 3d 1236.

No. 00–1552. PEZOLD, RICHEY, CARUSO & BARKER *v.* CHEROKEE NATION. Ct. Civ. App. Okla. Certiorari denied. Reported below: 18 P. 3d 364.

No. 00–1560. GENTILE ET AL. *v.* QUAKER OATS CO. C. A. 9th Cir. Certiorari denied. Reported below: 232 F. 3d 1271.

No. 00–1563. BEVERLY CALIFORNIA CORP., DBA BEVERLY ENTERPRISES *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 227 F. 3d 817.

No. 00–1568. DIETELBACH *v.* OHIO EDISON CO. C. A. 6th Cir. Certiorari denied. Reported below: 248 F. 3d 1147.

No. 00–1582. ARCADIS GERAGHTY & MILLER, INC. *v.* CONOCO INC. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 234 F. 3d 917.

No. 00–1604. BROWN & WILLIAMSON TOBACCO CORP., AS SUCCESSOR BY MERGER TO THE AMERICAN TOBACCO CO. *v.* CARTER ET UX. Sup. Ct. Fla. Certiorari denied. Reported below: 778 So. 2d 932.

No. 00–1629. JUNO MARINE AGENCY, INC., ET AL. *v.* TAIBL, SPECIAL PERSONAL REPRESENTATIVE OF THE ESTATE OF TAIBL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 761 So. 2d 373.

No. 00–1634. BECKER *v.* MACSENTI. C. A. 10th Cir. Certiorari denied. Reported below: 237 F. 3d 1223.

No. 00–1637. NORFOLK & WESTERN RAILWAY CO. *v.* DYE ET AL. Cir. Ct. Mingo County, W. Va. Certiorari denied.

No. 00–1639. PASTOREK *v.* TRAIL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 248 F. 3d 1140.

No. 00–1642. BEXLEY CITY SCHOOL DISTRICT ET AL. *v.* KNABLE, A MINOR, BY AND THROUGH HIS MOTHER AND NEXT

FRIEND, KNABLE. C. A. 6th Cir. Certiorari denied. Reported below: 238 F. 3d 755.

No. 00–1648. TURNER ET UX. *v.* CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS ET AL. Ct. App. Tex., 5th Dist. Certiorari denied. Reported below: 18 S. W. 3d 877.

No. 00–1655. PARRY *v.* MOHAWK MOTORS OF MICHIGAN, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 236 F. 3d 299.

No. 00–1660. SEYMOUR ET AL. *v.* CONNECTICUT ELECTIONS ENFORCEMENT COMMISSION. Sup. Ct. Conn. Certiorari denied. Reported below: 255 Conn. 78, 762 A. 2d 880.

No. 00–1667. GREEN, ADMINISTRATRIX OF THE ESTATE OF GREEN *v.* MERRILL LYNCH, PIERCE, FENNER & SMITH INC. ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 312 Ill. App. 3d 1197, 769 N. E. 2d 567.

No. 00–1670. CAMOSCIO *v.* DEMINICO. C. A. 1st Cir. Certiorari denied. Reported below: 248 F. 3d 1126.

No. 00–1673. WANG *v.* NEW YORK CITY DEPARTMENT OF FINANCE. C. A. 2d Cir. Certiorari denied. Reported below: 216 F. 3d 1074.

No. 00–1686. ROST *v.* CITY OF HENDERSON. Sup. Ct. Nev. Certiorari denied.

No. 00–1690. STURGEON *v.* BENTON ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 242 F. 3d 376.

No. 00–1694. CAMOSCIO *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied.

No. 00–1701. BODELL, INDIVIDUALLY AND ON BEHALF OF BODELL, AN INFANT *v.* CUNNINGHAM ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 248 F. 3d 1146.

No. 00–1713. TORRES GONZALEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 240 F. 3d 14.

No. 00–1730. FRASER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 96 N. Y. 2d 318, 752 N. E. 2d 244.

No. 00–1731. DIERKING *v.* INDUSTRIAL COMMISSION OF ARIZONA ET AL. Ct. App. Ariz. Certiorari denied.

No. 00–1744. BRILEY *v.* NATIONAL ARCHIVES AND RECORDS ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 236 F. 3d 1373.

No. 00–1752. BROWN *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 251 F. 3d 169.

No. 00–1761. UMANA *v.* SWIDLER & BERLIN, CHARTERED, ET AL. Ct. App. D. C. Certiorari denied. Reported below: 745 A. 2d 334.

No. 00–1784. TUVELL *v.* MICROSOFT CORP. C. A. 1st Cir. Certiorari denied. Reported below: 248 F. 3d 1127.

No. 00–1785. VICK *v.* WILLIAMS, SUPERINTENDENT, TILLERY CORRECTIONAL CENTER. C. A. 4th Cir. Certiorari denied. Reported below: 233 F. 3d 213.

No. 00–1793. PETERS *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 261 Neb. 416, 622 N. W. 2d 918.

No. 00–1795. STOVALL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 237 F. 3d 634.

No. 00–1805. WOOD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 248 F. 3d 1143.

No. 00–1812. SUTTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 5 Fed. Appx. 659.

No. 00–1817. MARTIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 220 F. 3d 585.

No. 00–1819. CUETO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 00–6650. SKELTON *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 00–7265. LEVY *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied.

No. 00–7786. SALDANA *v.* UNITED STATES;
No. 00–8360. KNIGHT *v.* UNITED STATES;
No. 00–8388. SCALES *v.* UNITED STATES;
No. 00–8483. SALDANA *v.* UNITED STATES;

No. 00–8597. VELEZ, AKA ROSA, AKA RODRIGUEZ *v.* UNITED STATES;
No. 00–8809. MOREJON *v.* UNITED STATES; and
No. 00–9219. HARRIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 234 F. 3d 709.

No. 00–8646. MAYE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 205 F. 3d 1335.

No. 00–8697. WILLIAMS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 193 Ill. 2d 306, 739 N. E. 2d 455.

No. 00–8761. BERRY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 232 F. 3d 897.

No. 00–8863. EURY *v.* SHINAULT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 411.

No. 00–8878. JOHNSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 221 F. 3d 83.

No. 00–9047. ALEXANDER *v.* MOSLEY, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 00–9051. SWATZIE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 228 F. 3d 1278.

No. 00–9160. CARRUTHERS *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 35 S. W. 3d 516.

No. 00–9174. GUZMAN-OCAMPO, AKA GUZMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 236 F. 3d 233.

No. 00–9213. GUEVARA-TORRES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 00–9223. GALLO-CHAMORRO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 233 F. 3d 1298.

No. 00–9262. ABDUL-AKBAR *v.* MCKELVIE, JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 239 F. 3d 307.

No. 00–9292. WILLS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 234 F. 3d 174.

No. 00–9496. GALES *v.* LUGI. C. A. 4th Cir. Certiorari denied. Reported below: 210 F. 3d 361.

No. 00–9628. BENSINGER *v.* BROWN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 248 F. 3d 1129.

No. 00–9635. MORALES ET AL. *v.* PRESIDENT JUDGE, COMMON PLEAS COURT OF PHILADELPHIA COUNTY, ET AL. Sup. Ct. Pa. Certiorari denied.

No. 00–9636. KUPLEN *v.* HAMDEN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 243 F. 3d 538.

No. 00–9638. PEOPLES *v.* MICHIGAN. C. A. 6th Cir. Certiorari denied.

No. 00–9639. BELL *v.* HICKMAN, WARDEN, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 00–9649. PELLOT *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 00–9650. AZEEZ *v.* HUN, WEST VIRGINIA COMMISSIONER OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 243 F. 3d 535.

No. 00–9652. KUHN *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 239 Wis. 2d 594, 620 N. W. 2d 482.

No. 00–9653. JONES *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–9654. SHAU CHAN *v.* ARTUZ, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 00–9656. ANDERSON *v.* TERHUNE, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 00–9657. DAVIS *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 84 Cal. App. 4th 390, 100 Cal. Rptr. 2d 835.

No. 00–9660. DOWELL *v.* HONEST. C. A. 9th Cir. Certiorari denied.

No. 00–9661. RUIZ *v.* MILES, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 00–9662. KIRCHNER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 194 Ill. 2d 502, 743 N. E. 2d 94.

No. 00–9664. NEWMAN *v.* VILLA. C. A. 9th Cir. Certiorari denied.

No. 00–9673. RANDLE *v.* NEWLAND, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 00–9675. MOODY *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 00–9677. LANE *v.* DEES, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 00–9678. SHAFFER *v.* BOONE, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 242 F. 3d 390.

No. 00–9680. DIAZ *v.* WILTGEN ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–9681. CATCHINGS *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 00–9691. WOGOMAN *v.* ABRAMAJTYS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 00–9697. SHAFFER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 00–9698. REYES *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 00–9707. GULLICK *v.* BISSONNETTE, SUPERINTENDENT, NORTH CENTRAL CORRECTIONAL INSTITUTION. C. A. 1st Cir. Certiorari denied.

No. 00–9710. FILIPOS *v.* FILIPOS. Super. Ct. Pa. Certiorari denied.

No. 00–9711. IRVIN *v.* WITHROW, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 00–9714. BAKER *v.* ASHCROFT, ATTORNEY GENERAL, ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–9723. GIBSON *v.* MCBRIDE, SUPERINTENDENT, WESTVILLE CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 00–9730. WILKENS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 238 F. 3d 328.

No. 00–9733. CAMPBELL *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 90 Ohio St. 3d 320, 738 N. E. 2d 1178.

No. 00–9738. CHAPMAN *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 194 Ill. 2d 186, 743 N. E. 2d 48.

No. 00–9761. SATTERFIELD *v.* MONSANTO CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 238 F. 3d 217.

No. 00–9787. ANTONIO PALACIOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 739.

No. 00–9799. ARMSTRONG *v.* PHILLIPS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 00–9800. CELESTINO-MAGDALENO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 741.

No. 00–9807. IOANE *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 4 Fed. Appx. 762.

No. 00–9821. GREEN *v.* SCHLTGEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 00–9824. HESS *v.* STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 243 F. 3d 548.

No. 00–9828. LOPEZ *v.* CAMBRA, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 232 F. 3d 895.

No. 00–9835. HARRIS *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 233 F. 3d 578.

No. 00–9837. QUINTANILLA MENDOZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 741.

No. 00–9844. CAVIELES-GODOY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 741.

No. 00–9869. CARDENAS-GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 741.

No. 00–9876. DICKERSON *v.* LOUISIANA. Ct. App. La., 5th Cir. Certiorari denied. Reported below: 751 So. 2d 425.

No. 00–9888. GOMEZ-ELVIR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 741.

No. 00–9891. HALE *v.* GIBSON, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 227 F. 3d 1298.

No. 00–9897. GLEE *v.* ASHCROFT, ATTORNEY GENERAL, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 00–9908. REED *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 226 F. 3d 649.

No. 00–9931. HALL *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 00–9938. MARRERO *v.* PRINCIPI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 5 Fed. Appx. 891.

No. 00–9962. MAGANA-FRIAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 739.

No. 00–9964. STONE *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 00–9973. ORELLANA-RIVERA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 741.

No. 00–9989. RODRIGUEZ-HERRERA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 739.

No. 00–9995. CRENSHAW *v.* HUBBARD, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 248 F. 3d 1170.

No. 00–10005. GRIMM *v.* VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 243 F. 3d 537.

No. 00–10012. LENNON *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 00–10016. GOMEZ-LOZANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 248 F. 3d 1142.

No. 00–10018. BARNES *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS. C. A. 8th Cir. Certiorari denied.

No. 00–10057. HERNANDEZ-RICO, AKA RIVERA-GUERRA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 742.

No. 00–10059. ANDREWS *v.* BELL. C. A. 4th Cir. Certiorari denied. Reported below: 246 F. 3d 662.

No. 00–10060. GRIER *v.* DAYS INN. C. A. 4th Cir. Certiorari denied. Reported below: 246 F. 3d 664.

No. 00–10066. WATTS *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 341 Ark. xxii.

No. 00–10085. GALLEGOS-CALDERON, AKA CALDERON-GALLEGOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 739.

No. 00–10089. LABLANCHE *v.* UNIVERSITY OF IOWA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 242 F. 3d 375.

No. 00–10090. MAKIDON *v.* ELO, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 248 F. 3d 1150.

No. 00–10102. DRUMMOND *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 238 F. 3d 411.

No. 00–10125. JOHNSON *v.* UNITED STATES; and
No. 00–10287. BULLARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 744.

No. 00–10127. RUIZ-GONZALEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 742.

No. 00–10144. TYSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 00–10147. WILLIAMS *v.* STUBBLEFIELD, SUPERINTENDENT, MISSOURI EASTERN CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 00–10158. ALVARADO-ESPARZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 740.

No. 00–10160. LOPEZ-CERVANTES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 744.

No. 00–10170. DE LA CRUZ DE JESUS *v.* UNITED STATES (Reported below: 250 F. 3d 743); AMAYA-FONTES *v.* UNITED STATES (250 F. 3d 743); ARELLANO-CAMPOS *v.* UNITED STATES (250 F. 3d 743); CALDERON-MORALES *v.* UNITED STATES (250 F. 3d 743); CRUZ-MORENO *v.* UNITED STATES (250 F. 3d 743); ELIZALDE-LIRA *v.* UNITED STATES (250 F. 3d 743); GEORGIA-LUCIANO *v.* UNITED STATES (250 F. 3d 743); HERRERA-HERNANDEZ *v.* UNITED STATES (250 F. 3d 742); JIMENEZ *v.* UNITED STATES (250 F. 3d 743); JUAREZ-SIDAS *v.* UNITED STATES (250 F. 3d 743); MARTINEZ-RAMOS *v.* UNITED STATES (250 F. 3d 743); MASCORRO-CHAVARRIA *v.* UNITED STATES (250 F. 3d 743); MOLINA-BARRAZA *v.* UNITED STATES (250 F. 3d 743); NAVARRO-FLORES *v.* UNITED STATES (250 F. 3d 743); POSADA-RANGEL *v.* UNITED STATES (250 F. 3d 743); REYES-NAVA *v.* UNITED STATES (250 F. 3d 743); RODRIGUEZ-AYALA *v.* UNITED STATES (250 F. 3d 742); RODRIGUEZ-GONZALEZ *v.* UNITED STATES (250 F. 3d 743); SANDOVAL-NUNGARAY *v.* UNITED STATES (250 F. 3d 743); and ZUNIGA-MARTINEZ *v.* UNITED STATES (250 F. 3d 743). C. A. 5th Cir. Certiorari denied.

No. 00–10186. REYNOLDS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 00–10190. BAZUAYE, AKA AUSTIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 240 F. 3d 861.

No. 00–10191. BRAXTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 740.

No. 00–10192. HERNANDEZ-BAUTISTA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 11 Fed. Appx. 711.

No. 00–10193. GRASSIE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 237 F. 3d 1199.

No. 00–10194. FRYE *v.* LEE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 235 F. 3d 897.

No. 00–10195. GUZMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 00–10196. GARCIA-HERNANDEZ ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 742 and 743.

No. 00–10197. GARCIA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 240 F. 3d 180.

No. 00–10198. FENNER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 246 F. 3d 669.

No. 00–10203. FAIRCLOTH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 225 F. 3d 655.

No. 00–10205. NEATHERLIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 243 F. 3d 551.

No. 00–10206. PROVOST *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 237 F. 3d 934.

No. 00–10209. RICHARDS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 241 F. 3d 335.

No. 00–10213. BROWN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 6 Fed. Appx. 748.

No. 00–10217. CALDERON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 243 F. 3d 587.

No. 00–10221. THOMAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 242 F. 3d 1028.

No. 00–10223. TYLER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 00–10225. WASHINGTON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 246 F. 3d 683.

No. 00–10226. WHITE *v.* LANSING, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 246 F. 3d 684.

No. 00–10232. FREDRICK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 00–10237. BOONE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 243 F. 3d 541.

No. 00–10238. FITTS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 252 F. 3d 1359.

No. 00–10241. ADAMS *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 243 F. 3d 560.

No. 00–10242. TAYLOR *v.* HAWK SAWYER, DIRECTOR, FEDERAL BUREAU OF PRISONS, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 254 F. 3d 316.

No. 00–10243. YOUNG *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 248 F. 3d 260.

No. 00–10244. WASHINGTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 248 F. 3d 1161.

No. 00–10246. SCARPA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 4 Fed. Appx. 115.

No. 00–10247. RANGEL-GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 248 F. 3d 1174.

No. 00–10248. RABE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 743.

No. 00–10252. LITEKY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 248 F. 3d 1180.

No. 00–10254. ORR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 243 F. 3d 543.

No. 00–10256. MOSS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 248 F. 3d 1153.

No. 00–10260. KING *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 11 Fed. Appx. 621.

No. 00–10268. MALDONADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 239 F. 3d 722.

No. 00–10269. ROLDAN-PALACIOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 4 Fed. Appx. 457.

No. 00–10272. DENNIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 11 Fed. Appx. 716.

No. 00–10276. HODGES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 4 Fed. Appx. 497.

No. 00–10282. WOOTEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 253 F. 3d 700.

No. 00–10285. BLAKE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 248 F. 3d 1178.

No. 00–10289. WILSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 244 F. 3d 1208.

No. 00–10290. WILSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 246 F. 3d 671.

No. 00–10297. HURON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 246 F. 3d 669.

No. 00–10298. JIMENEZ-NAVA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 243 F. 3d 192.

No. 00–10299. GRIFFIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 248 F. 3d 1153.

No. 00–10303. ALONZO-OROZCO *v.* UNITED STATES; MARTINEZ-RODRIGUEZ *v.* UNITED STATES; and ROSALES-ZAVALA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 250 F. 3d 742 (first and second judgments) and 743 (third judgment).

No. 00–10305. REEVES *v.* OHIO BUREAU OF EMPLOYMENT SERVICES ET AL. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 00–10310. SHOMORIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 229 F. 3d 1161.

No. 00–10317. ASTELLO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 241 F. 3d 965.

No. 00–10322. ARDLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 242 F. 3d 989.

No. 00–10323. ALVAREZ-GONZALEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 4 Fed. Appx. 502.

No. 00–10324. ARELLANO-SANDOVAL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 4 Fed. Appx. 538.

No. 00–10330. VILLARINO-PACHECO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 250 F. 3d 746.

No. 00–10332. YUDICE-CAMPOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 00–10345. ALEXANDER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 246 F. 3d 662.

No. 00–10352. MEDRANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 241 F. 3d 740.

No. 00–10355. AQUINO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 242 F. 3d 859.

No. 00–10356. BELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 5 Fed. Appx. 670.

No. 00–10364. BARTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 246 F. 3d 668.

No. 00–10367. LAMARRE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 248 F. 3d 642.

No. 00–10396. ROBBIO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 251 F. 3d 160.

No. 00–10398. JIMENEZ-MELENDREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 251 F. 3d 162.

No. 00–10404. MELLERSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 247 F. 3d 246.

No. 00–1537. CITICORP NORTH AMERICA, INC., ET AL. *v.* FRANCHISE TAX BOARD OF CALIFORNIA. Ct. App. Cal., 1st App. Dist. Motion of Committee on State Taxation for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 83 Cal. App. 4th 1403, 100 Cal. Rptr. 2d 509.

No. 00–1618. INDECK ENERGY SERVICES INC. ET AL. *v.* CONSUMERS ENERGY CO. ET AL. C. A. 6th Cir. Motion of Attorney General of Michigan for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 250 F. 3d 972.

No. 00–1621. UNITED STATES *v.* GWI PCS 1, INC., ET AL. C. A. 5th Cir. Motion of Cingular Wireless LLC et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 230 F. 3d 788.

No. 00–1661. ORGANIZATION FOR COMPETITIVE MARKETS, INC. *v.* SEABOARD FARMS, INC. C. A. 8th Cir. Motion of Reporters Committee for Freedom of the Press et al. for leave to file a brief as *amici curiae* granted. Certiorari denied.

Rehearing Denied

No. 00–1430. COSTNER *v.* ZMUDA ET AL., 532 U. S. 1021;

No. 00–1455. WOOD *v.* QUINN, SECRETARY OF THE VIRGINIA BOARD OF ELECTIONS, 532 U. S. 1021;

No. 00–1516. ALLISON ET UX. *v.* UNITED STATES ET AL., 532 U. S. 1022;

No. 00–1603. SCHLUND ET AL. *v.* UNITED STATES ET AL., 532 U. S. 1052;

No. 00–7828. THOMPSON *v.* TEXAS, 532 U. S. 1039;

No. 00–8021. MCQUIRTER *v.* BURKE, WARDEN, 532 U. S. 1023;

No. 00–8029. CALLOWAY *v.* UNITED STATES, 531 U. S. 1181;

No. 00–8152. GONCALVES *v.* RYDER, SUPERINTENDENT, MONROE CORRECTIONAL COMPLEX, 532 U. S. 946;

No. 00–8188. HAYDEN *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 532 U. S. 947;

No. 00–8423. FARRIS *v.* SAFFLE, DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS, ET AL. (two judgments), 532 U. S. 976;

No. 00–8472. BAZEMORE *v.* UNITED STATES, 532 U. S. 1023;

No. 00–8521. MELECIO-RODRIGUEZ *v.* UNITED STATES, 532 U. S. 1024;

No. 00–8524. PELLEGRINO *v.* SOUTH DAKOTA ET AL., 532 U. S. 979;

No. 00–8549. MASIAS *v.* TEXAS, 532 U. S. 979;

No. 00–8648. BOND *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, 532 U. S. 998;

No. 00–8743. FADAEL, AKA BARTH *v.* CAPE SAVINGS BANK ET AL., 532 U. S. 1011;

No. 00–8801. VONSCHOUNMACHER *v.* TEXAS, 532 U. S. 1024;

No. 00–8856. WILLIAMS *v.* HAYES, SHERIFF, ITAWAMBA COUNTY, MISSISSIPPI, ET AL., 532 U. S. 1012;

No. 00–8899. REID *v.* CITY OF FLINT ET AL., 532 U. S. 1026;

No. 00–8956. BUTCHER *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 532 U. S. 1027;

No. 00–9033. VILLEGAS *v.* LINDSEY, WARDEN, 532 U. S. 1041;

No. 00–9094. GEORGIOU *v.* HALTER, ACTING COMMISSIONER OF SOCIAL SECURITY, 532 U. S. 1028;

No. 00–9138. MCSHEFFREY *v.* EXECUTIVE OFFICE OF THE UNITED STATES ATTORNEYS ET AL., 532 U. S. 1042;

No. 00–9175. HUGHES *v.* DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT ET AL., 532 U. S. 1029;

No. 00–9194. HEIDLER *v.* GEORGIA, 532 U. S. 1029;

No. 00–9254. WINSLOW *v.* O'NEILL, SECRETARY OF THE TREASURY, 532 U. S. 1043;

No. 00–9344. CLARK *v.* NORTH DAKOTA, 532 U. S. 1043;

No. 00–9371. GLADSTONE *v.* HASTINGS ET AL., *ante*, p. 906; and

No. 00–9774. TOMAS *v.* UNITED STATES, 532 U. S. 1075. Petitions for rehearing denied.

No. 99–9417. KELLY *v.* SMALL, WARDEN, ET AL., 531 U. S. 918. Motion for leave to file petition for rehearing denied.

JULY 10, 2001

Miscellaneous Order

No. 01–5172 (01A34). IN RE MALLETT. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 00–10802 (00A1124). MALLETT *v.* MISSOURI. Sup. Ct. Mo. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.

No. 01–5173 (01A36). MALLETT *v.* MISSOURI. Sup. Ct. Mo. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.

JULY 11, 2001

Miscellaneous Order

No. 01–5072 (01A16). IN RE WILKENS. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

AUGUST 1, 2001

Dismissal Under Rule 46

No. 00–928. GREEN ET AL. *v.* CITY OF TUCSON. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 217 F. 3d 1081.

AUGUST 6, 2001

Miscellaneous Order

No. 00A986. PALMORE *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. Application for certificate of appealability, addressed to JUSTICE STEVENS and referred to the Court, denied.

Rehearing Denied

No. 00–997. SCHMIDT ET AL. *v.* UNITED STATES, *ante*, p. 902;

No. 00–1256. REYES-HERNANDEZ *v.* UNITED STATES, 532 U. S. 1065;

No. 00–1390. CATERINA ET AL. *v.* UNIFIED JUDICIAL SYSTEM OF PENNSYLVANIA ET AL., 532 U. S. 1008;

No. 00–1547. HUERTAS LABOY ET AL. *v.* PUERTO RICO ET AL., 532 U. S. 1066;

No. 00–1697. WILLIAMS *v.* CORPORATE EXPRESS DELIVERY SYSTEMS, *ante*, p. 917;

No. 00–7465. GONZALEZ *v.* MCDANIEL, 531 U. S. 1164;

No. 00–7781. RICHARDSON *v.* ALBERTSON'S, INC., ET AL., 531 U. S. 1197;

No. 00–8617. MERCED-NIEVES *v.* UNITED STATES, *ante*, p. 931;

No. 00–8930. SULLIVAN *v.* TEXAS, 532 U. S. 1027;

No. 00–8964. BAYRAMOGLU *v.* MADDOCK, WARDEN, ET AL., 532 U. S. 1028;

No. 00–8967. MAGGIO *v.* NORM REEVES HONDA ET AL., 532 U. S. 1040;

No. 00–8989. SONHOUSE *v.* NYNEX CORP. ET AL., 532 U. S. 1040;

No. 00–9071. SCHEXNIDER *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 532 U. S. 1042;

No. 00–9117. SEARS *v.* FLORIDA, 532 U. S. 1054;

No. 00–9128. EPHRAIM *v.* NEAL, WARDEN, 532 U. S. 1054;

No. 00–9134. LOFTEN *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 532 U. S. 1055;

No. 00–9183. HOLLEMAN *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, 532 U. S. 1068;

No. 00–9206. VESSEY *v.* UTAH, 532 U. S. 1029;

No. 00–9218. FULLER *v.* SPRAGINS ET AL., 532 U. S. 1029;

No. 00–9223. GALLO-CHAMORRO *v.* UNITED STATES, *ante*, p. 953;

No. 00–9226. HUGHES *v.* DEEDS, WARDEN, 532 U. S. 1042;

No. 00–9277. TERRY *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 532 U. S. 1071;

No. 00–9302. LAY *v.* CAIN, WARDEN, *ante*, p. 905;

No. 00–9369. HILL *v.* UNITED STATES, 532 U. S. 1032;

No. 00–9397. COSEY *v.* LOUISIANA, *ante*, p. 907;

No. 00–9406. WINFIELD *v.* UNITED STATES, 532 U. S. 1044;

No. 00–9408. BOATENG ET UX. *v.* INTER AMERICAN UNIVERSITY OF PUERTO RICO ET AL., *ante*, p. 918;

No. 00–9425. JONES *v.* THOMPSON, WARDEN, 532 U. S. 1056;

No. 00–9428. MARTIN *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, *ante*, p. 918;

No. 00–9479. FOSTER *v.* JONES, WARDEN, *ante*, p. 920;

No. 00–9489. BUTLER *v.* CRAVEN, WARDEN, 532 U. S. 1056;

No. 00–9518. SMITH *v.* UNITED STATES, 532 U. S. 1057;

No. 00–9539. GRADY *v.* UNITED STATES, 532 U. S. 1057;

No. 00–9563. MYRICK *v.* HAWK SAWYER, DIRECTOR, FEDERAL BUREAU OF PRISONS, ET AL., 532 U. S. 1057;

No. 00–9626. SUROVIK *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, *ante*, p. 935;

No. 00–9630. WEEKS *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 532 U. S. 1072;

No. 00–9717. HANKS *v.* CALIFORNIA BOARD FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS, *ante*, p. 921;
No. 00–9739. NAGY *v.* UNITED STATES, 532 U. S. 1074;
No. 00–9819. IN RE HARRIS, *ante*, p. 902;
No. 00–9862. MALADY *v.* UNITED STATES, *ante*, p. 910; and
No. 00–9863. PADRO BURGOS *v.* UNITED STATES, *ante*, p. 910. Petitions for rehearing denied.

No. 130, Orig. NEW HAMPSHIRE *v.* MAINE, 532 U. S. 742. Petition for rehearing denied. JUSTICE SOUTER took no part in the consideration or decision of this petition.

No. 00–1144. MCPHAUL *v.* BOARD OF COMMISSIONERS OF MADISON COUNTY ET AL., 532 U. S. 921. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

No. 00–1263. BALLS *v.* AT&T CORP., 532 U. S. 937. Petition for rehearing denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 00–8347. CAMARENA *v.* SUTER, CLERK, SUPREME COURT OF THE UNITED STATES, ET AL., 532 U. S. 934. Motion for leave to file petition for rehearing denied.

AUGUST 7, 2001

Certiorari Denied

No. 01–5409 (01A80). HILL *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

AUGUST 8, 2001

Miscellaneous Orders

No. 00–878. MATHIAS ET AL. *v.* WORLDCOM TECHNOLOGIES, INC., ET AL. C. A. 7th Cir. [Certiorari granted, 532 U. S. 903.] Motion of the United States to intervene granted. JUSTICE O'CONNOR took no part in the consideration or decision of this motion.

No. 01–5702 (01A115). IN RE HILL. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

AUGUST 13, 2001

Miscellaneous Order

No. 00A1147 (00–10618). BEAZLEY *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER would grant the application for stay of execution. JUSTICE SCALIA, JUSTICE SOUTER, and JUSTICE THOMAS took no part in the consideration or decision of this application.

AUGUST 22, 2001

Dismissal Under Rule 46

No. 01–5243. HUDSON *v.* CAMPBELL, CLERK, LYON COUNTY CIRCUIT COURT, ET AL. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 248 F. 3d 1149.

AUGUST 23, 2001

Certiorari Denied

No. 01–5943 (01A155). WHITE *v.* NORTH CAROLINA. Sup. Ct. N. C. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied. Reported below: 354 N. C. 74, 553 S. E. 2d 211.

No. 01–5944 (01A156). WHITE *v.* NORTH CAROLINA. Sup. Ct. N. C. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied. Reported below: 354 N. C. 227, 553 S. E. 2d 397.

No. 01–5960 (01A160). WHITE *v.* EASLEY, GOVERNOR OF NORTH CAROLINA, ET AL. Gen. Ct. Justice, Super. Ct. Div., Wake County, N. C. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied.

AUGUST 27, 2001

Miscellaneous Orders

No. 01A2. BUSH *v.* POWELL. Application for stay, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. 01A62 (00–10589). DANTAS *v.* DEPARTMENT OF JUSTICE ET AL. C. A. 1st Cir. Application for protective order, addressed to JUSTICE THOMAS and referred to the Court, denied.

Rehearing Denied

No. 00–1630. KANTH *v.* KANTH, *ante*, p. 929;

No. 00–1644. LANGFELDT ET AL. *v.* GENESIS MEDICAL CENTER, *ante*, p. 930;

No. 00–1659. ALLISON ET UX. *v.* UNITED STATES ET AL., *ante*, p. 916;

No. 00–1690. STURGEON *v.* BENTON ET AL., *ante*, p. 951;

No. 00–1694. CAMOSCIO *v.* MASSACHUSETTS, *ante*, p. 951;

No. 00–5961. TYLER *v.* CAIN, WARDEN, *ante*, p. 656;

No. 00–7786. SALDANA *v.* UNITED STATES, *ante*, p. 952;

No. 00–7973. RUBIS *v.* UNITED STATES, 532 U. S. 1023;

No. 00–8444. FIELDS *v.* CLARK ET AL., 532 U. S. 977;

No. 00–8471. LANIER *v.* UNITED STATES, *ante*, p. 904;

No. 00–8483. SALDANA *v.* UNITED STATES, *ante*, p. 952;

No. 00–8602. LASTER *v.* GEARIN, WARDEN, 532 U. S. 996;

No. 00–8992. CADOREE *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 532 U. S. 1040;

No. 00–9208. UNDERKOFLER *v.* COMMUNITY HEALTH CARE PLAN, INC., 532 U. S. 1055;

No. 00–9212. FARRIS *v.* POPPELL, WARDEN, ET AL., 532 U. S. 1069;

No. 00–9219. HARRIS *v.* UNITED STATES, *ante*, p. 953;

No. 00–9433. CONNER *v.* HEAD, WARDEN, *ante*, p. 932;

No. 00–9444. PADILLA *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 532 U. S. 1071;

No. 00–9451. ANDRADE *v.* CALIFORNIA WORKERS' COMPENSATION APPEALS BOARD, *ante*, p. 919;

No. 00–9454. BOYER *v.* UNITED STATES, *ante*, p. 907;

No. 00–9523. HOSS *v.* JACKSON, WARDEN, *ante*, p. 933;

No. 00–9613. BLACKWELL *v.* HOHN, AKA HAUN, *ante*, p. 935;

No. 00–9627. LOFTEN *v.* TEXAS, *ante*, p. 935;

No. 00–9638. PEOPLES *v.* MICHIGAN, *ante*, p. 954;

No. 00–9652. KUHN *v.* WISCONSIN, *ante*, p. 954;

No. 00–9659. IN RE WALKER, *ante*, p. 948;

No. 00–9669. ESPOSITO *v.* GEORGIA, *ante*, p. 935;

No. 00–9691. WOGOMAN *v.* ABRAMAJTYS, WARDEN, *ante*, p. 955;

No. 00–9703. FLEMING *v.* CRANE, *ante*, p. 921;

No. 00–9710. FILIPOS *v.* FILIPOS, *ante*, p. 955;

No. 00–9778. BROWN *v.* UNITED STATES, *ante*, p. 908;

No. 00–9821. GREEN *v.* SCHLTGEN, WARDEN, *ante*, p. 956;

No. 00–9854. WALSH *v.* UNITED STATES, *ante*, p. 936;

No. 00–9872. LYND *v.* TURPIN, WARDEN, *ante*, p. 921;

No. 00–9897. GLEE *v.* ASHCROFT, ATTORNEY GENERAL, ET AL., *ante*, p. 957;

No. 00–9938. MARRERO *v.* PRINCIPI, SECRETARY OF VETERANS AFFAIRS, *ante*, p. 957;

No. 00–10018. BARNES *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, *ante*, p. 958;

No. 00–10023. MCMILLAN *v.* WALKER, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, *ante*, p. 937;

No. 00–10027. MCKINNEY *v.* UNITED STATES, *ante*, p. 937;

No. 00–10066. WATTS *v.* ARKANSAS, *ante*, p. 958;

No. 00–10103. DOWDY *v.* UNITED STATES, *ante*, p. 939;

No. 00–10213. BROWN *v.* UNITED STATES, *ante*, p. 960; and

No. 00–10241. ADAMS *v.* UNITED STATES, *ante*, p. 961. Petitions for rehearing denied.

No. 00–8634. RAMOS-CARTAGENA *v.* UNITED STATES, 532 U. S. 1066. Motion for leave to file petition for rehearing denied.

AUGUST 30, 2001

Miscellaneous Order

No. 01–6047 (01A177). IN RE FRYE. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Petition for writ of habeas corpus denied. JUSTICE SCALIA took no part in the consideration or decision of this application and this petition.

Certiorari Denied

No. 00–9543. HALE *v.* DEPARTMENT OF JUSTICE ET AL. C. A. 10th Cir. Certiorari denied. JUSTICE SCALIA took no part in the consideration or decision of this petition. Reported below: 226 F. 3d 1200.

SEPTEMBER 5, 2001

Certiorari Denied

No. 00–10827 (01A144). TUCKER *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 242 F. 3d 617.

SEPTEMBER 7, 2001

Miscellaneous Orders

No. 00A1141 (01–286). TWEEDY *v.* OKLAHOMA BAR ASSN. Sup. Ct. Okla. Application for stay, addressed to JUSTICE THOMAS and referred to the Court, denied.

No. D–2254. IN RE DISBARMENT OF STIDHAM. Chuck R. Stidham, of Cincinnati, Ohio, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2255. IN RE DISBARMENT OF EVANS. Francis Birt Evans, Jr., of Canton, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2256. IN RE DISBARMENT OF GRIFFITHS. David Griffiths, of Bronx, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 99–1786. GREAT-WEST LIFE & ANNUITY INSURANCE CO. ET AL. *v.* KNUDSON ET AL. C. A. 9th Cir. [Certiorari granted, 531 U. S. 1124.] Motion of Maryland HMO Subrogation Plaintiffs for leave to file a brief as *amici curiae* granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 00–795. ASHCROFT, ATTORNEY GENERAL, ET AL. *v.* FREE SPEECH COALITION ET AL. C. A. 9th Cir. [Certiorari granted

sub nom. Holder v. *Free Speech Coalition*, 531 U. S. 1124.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 00–1293. ASHCROFT, ATTORNEY GENERAL *v.* AMERICAN CIVIL LIBERTIES UNION ET AL. C. A. 3d Cir. [Certiorari granted, 532 U. S. 1037.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

Rehearing Denied

No. 00–1713. TORRES GONZALEZ *v.* UNITED STATES, *ante*, p. 951;

No. 00–5778. EVANS *v.* GALAZA, WARDEN, ET AL., *ante*, p. 931;

No. 00–8388. SCALES *v.* UNITED STATES, *ante*, p. 952;

No. 00–8597. VELEZ, AKA ROSA, AKA RODRIGUEZ *v.* UNITED STATES, *ante*, p. 953;

No. 00–9047. ALEXANDER *v.* MOSLEY, WARDEN, *ante*, p. 953;

No. 00–9343. SINGLETON *v.* DAHLBERG, ACTING SECRETARY OF THE ARMY, 532 U. S. 1056;

No. 00–9403. KIRTLEY *v.* BAKER, *ante*, p. 918;

No. 00–9547. SCHEIB *v.* MELLON BANK ET AL., *ante*, p. 933;

No. 00–9631. WHITE *v.* UTAH ET AL., *ante*, p. 935;

No. 00–9712. HENDERSON *v.* LOCKYER, ATTORNEY GENERAL OF CALIFORNIA, ET AL., *ante*, p. 935;

No. 00–9956. CANDELARIO *v.* UNITED STATES, *ante*, p. 922; and

No. 00–10305. REEVES *v.* OHIO BUREAU OF EMPLOYMENT SERVICES ET AL., *ante*, p. 962. Petitions for rehearing denied.

SEPTEMBER 12, 2001

Miscellaneous Order

No. 01A236. BAGLEY, WARDEN *v.* BYRD. Application to vacate stay of execution of sentence of death entered by the United States Court of Appeals for the Sixth Circuit, presented to JUSTICE STEVENS, and by him referred to the Court, denied.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

John W. Byrd, Jr., was scheduled to be executed by the State of Ohio today, September 12, at 10 a.m. (e.d.t.). Byrd was convicted and sentenced to death in 1983 for the murder of Monte

Tewksbury. Byrd's conviction and sentence were upheld on direct appeal, and we denied certiorari. *Byrd* v. *Ohio*, 484 U. S. 1037 (1988). In 1988, Byrd filed a petition for state postconviction relief. The Ohio courts denied the petition. In 1994, Byrd filed a petition for writ of habeas corpus in federal court. The District Court and Court of Appeals for the Sixth Circuit dismissed the petition, and we again denied certiorari. *Byrd* v. *Collins*, 531 U. S. 1082 (2001). Byrd filed another petition for state postconviction relief on April 9, 2001. The trial court and Ohio Court of Appeals dismissed the petition, and the Ohio Supreme Court denied review. *State* v. *Byrd*, No. 01–1515, Aug. 29, 2001. Byrd then sought permission to file a second federal habeas petition. The Court of Appeals denied Byrd's request on September 10, but stayed the execution until September 18, 2001. On September 11, the Court of Appeals issued an order stating that a member of the court had requested that the en banc court determine whether to vacate the stay issued the day before. The order stated that less than a majority of the court voted in favor of vacating the stay, and "a majority of the active judges have voted to extend the stay of execution until October 8, 2001." No. 01–3927 (CA6, Sept. 11, 2001). The State has filed in this Court an application to vacate the stay granted by the Court of Appeals.

The Court of Appeals has stayed the execution of John Byrd without any explanation of a constitutional defect that would warrant the issuance of a stay by a federal court. The only opinion it has written convincingly concludes that there is no basis for a stay. The only reason the Court of Appeals has provided for granting the stay is to give "a panel member . . . additional time to consider the matter." In extending the stay until October 8, 2001, the court provided no additional justification. Byrd surmises that the Court of Appeals extended the stay to October 8 "in order to consider John Byrd's Petition for Rehearing En Banc." Response to State's Application Seeking Lifting of Stay 4. But the Court of Appeals' order does not offer this as a reason for granting the stay; the order only adds that "the clerk of the court is directed to file and submit to the court any petition offered by a party seeking en banc review of the decision of the panel." In any event, en banc consideration would not warrant granting a stay until October 8. As Judge

Batchelder points out in her opinion, under the Antiterrorism and Effective Death Penalty Act of 1996, the panel's decision denying Byrd's successive habeas application is not "permitted to be the subject of a petition for rehearing." No. 01–3927 (CA6, Sept. 10, 2001), p. 26 (citing 28 U. S. C. § 2244(b)(3)(E) (1994 ed., Supp. V)). And even if Byrd could seek en banc review, the Court of Appeals would be able to rule on the petition well before October 8. Indeed, the Court of Appeals issued the stay on September 10, and by the very next day the court had considered and rejected a judge's request for en banc reconsideration of the stay order. That leaves the rationale that a panel member needed "additional time to consider the matter." Of course, however, the panel has already issued its opinion. Seeing no justification for the stay, I would grant the State's application to vacate the stay. See *Bowersox* v. *Williams*, 517 U. S. 345 (1996) *(per curiam)* ("[I]t is 'particularly egregious' to enter a stay absent substantial grounds for relief" (citing *Delo* v. *Blair*, 509 U. S. 823 (1993) *(per curiam)*).

SEPTEMBER 17, 2001

Certiorari Denied

No. 01–6240 (01A243). BACON *v.* LEE, WARDEN, ET AL. Sup. Ct. N. C. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied. Reported below: 353 N. C. 696, 549 S. E. 2d 840.

SEPTEMBER 25, 2001

Certiorari Dismissed

No. 00–8727. MCCARVER *v.* NORTH CAROLINA. Sup. Ct. N. C. [Certiorari granted, 532 U. S. 941.] Writ of certiorari dismissed as improvidently granted.

Miscellaneous Order

No. 99–1786. GREAT-WEST LIFE & ANNUITY INSURANCE CO. ET AL. *v.* KNUDSON ET AL. C. A. 9th Cir. [Certiorari granted, 531 U. S. 1124.] Motion of respondents for leave to participate in oral argument and for divided argument denied.

Certiorari Granted

No. 00–1567. YOUNG ET UX. *v.* UNITED STATES. C. A. 1st Cir. Certiorari granted. Reported below: 233 F. 3d 56.

No. 00–1595. HOFFMAN PLASTIC COMPOUNDS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari granted. Reported below: 237 F. 3d 639.

No. 00–1831. UNITED STATES *v.* CRAFT. C. A. 6th Cir. Certiorari granted. Reported below: 233 F. 3d 358.

No. 00–1853. SWIERKIEWICZ *v.* SOREMA N. A. C. A. 2d Cir. Certiorari granted. Reported below: 5 Fed. Appx. 63.

No. 00–1751. ZELMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION OF OHIO, ET AL. *v.* SIMMONS-HARRIS ET AL.;
No. 00–1777. HANNA PERKINS SCHOOL ET AL. *v.* SIMMONS-HARRIS ET AL.; and
No. 00–1779. TAYLOR ET AL. *v.* SIMMONS-HARRIS ET AL. C. A. 6th Cir. Certiorari in Nos. 00–1751 and 00–1777 granted. Certiorari in No. 00–1779 granted limited to Question 1 presented by the petition. Cases are consolidated, and a total of one hour is allotted for oral argument. Reported below: 234 F. 3d 945.

No. 00–1770. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT *v.* RUCKER ET AL. C. A. 9th Cir. Motion of Housing and Development Law Institute et al. for leave to file a brief as *amici curiae* granted. Certiorari granted. JUSTICE BREYER took no part in the consideration or decision of this motion and this petition. Reported below: 237 F. 3d 1113.

No. 00–1937. MASSANARI, ACTING COMMISSIONER OF SOCIAL SECURITY *v.* WALTON. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 235 F. 3d 184.

No. 00–8452. ATKINS *v.* VIRGINIA. Sup. Ct. Va. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 260 Va. 375, 534 S. E. 2d 312.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 976 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

BROWN ET AL. *v.* GILMORE, GOVERNOR OF VIRGINIA, ET AL.

ON APPLICATION FOR INJUNCTION

No. 01A194 (01–384). Decided September 12, 2001

The application of Virginia public school students and their parents for an injunction against enforcement of a Virginia statute requiring public schools to observe a "minute of silence" each schoolday, pending this Court's disposition of their petition for certiorari, is denied. Applicants, who claim that the statute establishes religion in violation of the First Amendment, have been unsuccessful in their repeated attempts to obtain injunctive relief from both the District Court and the Court of Appeals and in their attack on the statute's merits. The All Writs Act, this Court's only authority to issue an injunction against enforcement of a presumptively valid state statute, is appropriate only if the legal rights at issue are indisputably clear, *Ohio Citizens for Responsible Energy, Inc.* v. *NRC*, 479 U. S. 1312, 1313, which is not the case here. Finding that Virginia's statute has a clear secular purpose—namely, to provide a moment for quiet reflection in the wake of instances of violence in the public schools—the Court of Appeals distinguished the present case from *Wallace* v. *Jaffree*, 472 U. S. 38, in which this Court struck down a similar Alabama statute that was conceded to have the purpose of returning prayer to the public schools. At the very least, the lower court's finding places some doubt on the question whether Virginia's statute establishes religion in violation of the First Amendment. Justice Powell stayed a District Court order dissolving a preliminary injunction in *Wallace* when the plaintiffs there alleged that teachers led their classes in prayer daily. Here, by contrast, after more than a year in operation, the minute of silence seems to have meant just that. Also, that applicants did not make an immediate application to a Justice in September 2000, after the Court of Appeals denied their request for an injunction pending appeal, is somewhat inconsistent with the urgency they now assert.

CHIEF JUSTICE REHNQUIST, Circuit Justice.

This case is before me on an application for injunctive relief pending writ of certiorari pursuant to 28 U. S. C. § 1651. Applicants seek an order enjoining further implementation of Virginia's mandatory "minute of silence" statute, Va. Code Ann. § 22.1–203 (2000), pending this Court's disposition of their petition for certiorari which has been filed contemporaneously with this application. The petition for certiorari seeks review of a decision of the Court of Appeals affirming the constitutionality of § 22.1–203. See 258 F. 3d 265 (CA4 2001). For the reasons that follow, I conclude that an injunction should not issue.

Applicants are Virginia public school students and their parents who challenge the constitutionality of a state statute, effective as of July 1, 2000, that requires all of Virginia's public schools to observe a minute of silence at the start of each schoolday. They challenge the statute on its face, contending that it establishes religion in violation of the First Amendment. For the past year, applicants have repeatedly sought temporary and permanent injunctive relief from both the District Court and the Court of Appeals to enjoin Virginia's enforcement and implementation of this statute. On August 31, 2000, the District Court for the Eastern District of Virginia held a hearing on applicants' motion for preliminary injunctive relief in light of the approaching school year. This motion was denied. Applicants then requested that the District Court enter an injunction pending appeal, which was also denied. They then moved in the Court of Appeals for an injunction pending appeal. This motion was denied as well.

Applicants have been no more successful on the merits. On October 26, 2000, the District Court granted respondents' motion for summary judgment and dismissed applicants' challenge in its entirety. Applicants then sought expedited review in the Court of Appeals, which was denied. On July 24, 2001, a divided panel of the Court of Appeals affirmed the

District Court's dismissal of applicants' complaint, as well as its earlier denial of applicants' motion for injunctive relief. This application to me followed.

I note first that applicants are seeking not merely a stay of a lower court judgment, but an injunction against the enforcement of a presumptively valid state statute. The All Writs Act, 28 U. S. C. § 1651(a), is the only source of this Court's authority to issue such an injunction. It is established, and our own rules require, that injunctive relief under the All Writs Act is to be used "'sparingly and only in the most critical and exigent circumstances.'" *Ohio Citizens for Responsible Energy, Inc.* v. *NRC*, 479 U. S. 1312, 1313 (1986) (SCALIA, J., in chambers) (quoting *Fishman* v. *Schaffer*, 429 U. S. 1325, 1326 (1976) (Marshall, J., in chambers)). Such an injunction is appropriate only if "the legal rights at issue are 'indisputably clear.'" 479 U. S., at 1313 (quoting *Communist Party of Ind.* v. *Whitcomb*, 409 U. S. 1235 (1972) (REHNQUIST, J., in chambers)).

Whatever else may be said about the issues and equities in this case, the rights of the applicants are not "indisputably clear." The pros and cons of the applicants' claim on the merits are fully set forth in the majority and dissenting opinions in the Court of Appeals. Applicants contend that this case is virtually a replay of *Wallace* v. *Jaffree*, 472 U. S. 38 (1985), in which we struck down a similar Alabama statute. But the majority opinion in the Court of Appeals took pains to distinguish the present case from *Wallace*. It noted our statement that the statute at issue there was "'quite different from [a statute] merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the schoolday.'" *Id.*, at 59, as quoted in 258 F. 3d, at 279. It further found ample evidence that § 22.1–203 had a clear secular purpose, namely, to provide a moment for quiet reflection in the wake of high-profile instances of violence in our public schools. *Id.*, at 276–277. This alone may distinguish *Wallace*, in which Alabama ex-

plicitly conceded that the sole purpose of its moment of silence law was to return prayer to the Alabama schools. We in fact emphasized in *Wallace* that the Alabama statute "had *no* secular purpose." 472 U. S., at 56 (emphasis in original). At the very least the lower court's finding of a clear secular purpose in this case casts some doubt on the question whether § 22.1–203 establishes religion in violation of the First Amendment. See, *e. g., id.*, at 66 (Powell, J., concurring) ("[A] straightforward moment-of-silence statute is unlikely to 'advance or inhibit religion'"); *id.*, at 73 (O'CONNOR, J., concurring in judgment) ("Even if a statute specifies that a student may choose to pray silently during a quiet moment, the State has not thereby encouraged prayer over other specified alternatives").

Without expressing any view of my own, or attempting to predict the views of my colleagues as to the ultimate merit of applicants' First Amendment claim, I can say with some confidence that their position is less than indisputable.

Applicants point out that Justice Powell stayed the order of the District Court dissolving a preliminary injunction in *Wallace*. See *Jaffree* v. *Board of School Comm'rs of Mobile Cty.*, 459 U. S. 1314 (1983) (opinion in chambers). But there the plaintiffs alleged that "teachers had 'on a daily basis' led their classes in saying certain prayers in unison." *Wallace, supra*, at 42. Here, by contrast, after more than a year of operation, the Virginia statute providing for a minute of silence seems to have meant just that. There is no allegation that Virginia schoolteachers have used the minute of silence, or any other occasion, to lead students in collective prayer. To the contrary, the Court of Appeals noted that between 1976 and 2000 at least 20 local school divisions in Virginia established a minute of silence in their classrooms, yet there is no evidence of the practice having ever been used as a government prayer exercise.

I also note that applicants could have made an immediate application to a Justice of this Court under 28 U. S. C.

§ 1651(a) in September 2000, after the Court of Appeals denied their request for an injunction pending appeal. That they did not do so is somewhat inconsistent with the urgency they now assert.

For these reasons, I decline to issue an injunction pending certiorari in this case.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS, 1998, 1999 AND 2000

	ORIGINAL			PAID			IN FORMA PAUPERIS			TOTALS		
	1998	**1999**	**2000**	**1998**	**1999**	**2000**	**1998**	**1999**	**2000**	**1998**	**1999**	**2000**
Number of cases on dockets	7	8	9	2,387	2,413	2,305	5,689	6,024	6,651	8,083	8,445	8,965
Number disposed of during term	2	0	2	2,066	2,062	1,981	4,947	5,270	5,730	7,015	7,332	7,713
Number remaining on dockets	5	8	7	321	351	324	742	754	921	1,058	1,113	1,252

	TERMS		
	1998	**1999**	**2000**
Cases argued during term	90	[1] 83	86
Number disposed of by full opinions	84	[2] 74	83
Number disposed of by per curiam opinions	4	2	[3] 4
Number set for reargument	2	1	0
Cases granted review this term	81	93	99
Cases reviewed and decided without oral argument	59	54	[3] 127
Total cases to be available for argument at outset of following term	30	37	49

[1] Includes reargument in 98–6322.

[2] Includes 98–942 question certified to Supreme Court of Pennsylvania.

[3] Includes 98–942 argued October 12, 1999.

JUNE 29, 2001

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